IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,
Plaintiffs,
vs.
R.J. REYNOLDS TOBACCO
COMPANY, et al.,
Defendants.
_____/

Miami-Dade County Courthouse
Miami, Florida
Monday, 8:30 a.m.
November 23, 1998

TRIAL - VOLUME 144

The above-styled cause came on for trial before the Honorable Robert Paul Kaye, Circuit Judge, pursuant to notice.

APPEARANCES:
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SUSAN ROSENBLATT, ESQ.
On behalf of Plaintiffs
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SEAN P. WAJERT, ESQ.
On behalf of Defendant Philip Morris
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NORMAN A. COLL, ESQ.
On behalf of Defendant Philip Morris
ZACK KOSNITZKY
STEPHEN N. ZACK, ESQ.
On behalf of Defendant Philip Morris
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R. BENJAMINE REID, ESQ.
On behalf of Defendant R.J. Reynolds
JONES, DAY, REAVIS & POGUE
RICHARD M. KIRBY, ESQ.
On behalf of Defendant R.J. Reynolds
KING & SPALDING
MICHAEL RUSS, ESQ.
RICHARD A. SCHNEIDER, ESQ.
On behalf of Defendant Brown & Williamson
CLARKE SILVERGLATE WILLIAMS & MONTGOMERY
KELLY ANNE LUTHER, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group
SHOOK HARDY & BACON
EDWARD A. MOSS, ESQ.
WILLIAM P. GERAGHTY, ESQ.
On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.
On behalf of Defendant Lorillard
DEBEVOISE & PLIMPTON

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ANNE COHEN, ESQ.
JOSEPH R. MOODHE, ESQ.
On behalf of Defendant The Council for Tobacco Research

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APPEARANCES (Continued)

GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL
DAVID L. ROSS, ESQ.
On behalf of Defendant Lorillard
MARTINEZ & GUTIERREZ
JOSE MARTINEZ, ESQ.
On behalf of Defendant Dosal Tobacco Corp.
and Tobacco Institute
KASOWITZ BENSON TORRES & FRIEDMAN
AARON MARKS, ESQ.
NANCY STRAUB, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

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(Whereupon, the following proceedings were had:)

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THE COURT: Good morning. First, let me say thank you, thank you, thank you, for this very short notice, coming in at 8:30. I had forgotten Friday to let you know to come in at 8:30 so we could get this out of the way before the jury came in, because we have to go through the voir dire.

I had forgotten about it. It was my fault. So I do appreciate you coming in the hour earlier.

Okay. We are ready to proceed?

MR. ROSENBLATT: Yes, Your Honor.

MR. HEIM: Your Honor, since we are here early, and I'm sure you want to take up Father Drinan first, if we finish that before 9:30, I'd like to also take up the subject of what Mr. Uydess will be permitted to testify about.

THE COURT: First things first. Let's get this out of the way.

Okay, Father. If you'd come up here, please, sir.

Thereupon:

FATHER ROBERT F. DRINAN

having been called as a witness, was duly sworn, examined, and testified as follows:

THE COURT: Okay. We're taking a voir dire

session here to get into the context of your testimony, what it is you're going to testify about, basically what we're going to present to the jury, so we don't have any delay if there's an objection.

VOIR DIRE EXAMINATION

BY MR. SCHNEIDER:

Q. Good morning, Father.

A. Good morning.

Q. Let me introduce myself again. I'm Richard Schneider from the law firm of King & Spalding. I'm here to ask you some questions on behalf of the defendants here this morning.

Could you please state your full name for the record?

A. Robert F. Drinan.

Q. You are a Jesuit Roman Catholic priest, correct?

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A. Yes.
Q. You're also a lawyer?
A. Yes.
Q. And as I understand it, you were in Congress for ten years?
A. '71 to '81.
Q. Then you withdrew from Congress pursuant to the orders of the Roman Catholic church, correct?

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A. Change in Canon law.
Q. Father, I took your deposition in this case in June of 1998, correct?
A. Yes.
Q. At that time you identified yourself for me as an expert in the field of legal ethics, correct?
A. Yes.
Q. And it's your understanding that you've been called as a witness in this case in the field of legal ethics, correct?
A. At least that.
Q. All right. When you say at least that, what other fields do you think you've been called to testify about?
A. About business ethics, about what corporations can do in American law.
Q. Now, Father Drinan, I want to show you your deposition.
MR. SCHNEIDER: Do you have his deposition, Stanley?
BY MR. SCHNEIDER:
Q. Father Drinan, I've put before you what is a copy of your deposition taken in this case in June of 1998. Do you recognize it?
A. Yes, I do.

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Q. Have you read it before?
A. Yes, I have.
Q. All right. Let me ask you to take a look at Page 20, Line 11, and where you were asked the following question and gave the following answer:
Question: Have you appeared in a

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courtroom
and examined witnesses, given opening statements, made
closing statements and appeared before the court in a
trial on behalf of a client?
Answer: Do I have a right to ask why this is
relevant? I'm an expert on legal ethics.
Do you see that?
A. I do.
Q. Let me also address your attention Page 21,
Line 18, question: You have been designated in this
case by the plaintiffs as an expert in legal ethics,
correct?
A. Yes.
Q. Answer: Yes.
A. Yes.
Q. That's what you said, correct?
A. Yes.
Q. Let me direct your attention to Page 29, Line
3, question: So you have no understanding of that?
Answer: Sir, I told you before. I recall

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vaguely this whole material. I have been involved in
this for three to five years. I can't recall
particularly every person. But if you're leading up to
the thing that these papers were stolen, I know the
controversy about that.
Furthermore, this is not my bailiwick at all.
I'm here as an expert on legal ethics, to testify about
the lawyers and about the model rules and what they
say.
Correct?
A. Yes.
Q. Now, let me address your attention to Page
132, Line 23, Question: And as you sit here today, you
cannot name for me any of the lawyers that you think
were involved, correct?
Answer: That's passed into history. I'm not
here, sir, to indict particular lawyers or particular
companies. I'm here as an expert in legal ethics to

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say here are the things that were violated by the lawyers.
That's part of your answer on Page 133, correct?
A. Yes.
Q. Now, you were asked multiple times then in your deposition what your field of expertise was and

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what you were designated to testify about, and you said legal ethics, correct?
A. Yes.
Q. You never once said business ethics?
A. Legal ethics assumes business ethics.
Q. Let me ask you to address your attention now to your Texas deposition.
I've shown you a copy of a deposition that was given in the state of Texas case in October of 1997, correct?
A. Yes.
Q. Let me address your attention to Page 19 of that deposition.
A. Yes.
Q. And specifically Line 19. This is a portion of a question.
A. Yes.
Q. Let me start with some general questions about those materials.
First of all, included among them was an affidavit by Dr. Thomas Murray, who, as you may recall, is the biomedical ethicist expert for the state of Texas in this case. Do you recall that?
A. I do.
Q. Answer: I do.

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Question: And you understand that he is, as we understand it, to testify, while you are here as an expert on the legal ethics side of it, Dr. Murray is to testify on the biomedical ethics side of it? Is that your understanding?
Answer: I don't recall that, but that confined my testimony here as to the area here that I know, namely legal ethics. And when I read all these other things, I respect that gentleman but I'm not

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in a
position to take a position yes or no.
Correct?
A. Yes.
Q. And if you look on the Page 19, excuse me,
Page 20, Line 24, Question: And specifically, his factual investigation was into the research, specifically the scientific research conducted by and
sponsored by the tobacco companies. Did you understand
that?
Answer: Uh-huh.
Question: You have to answer yes or no.
Answer: Yes.
Question: And you don't have any reason, do
you, Father, to doubt the accuracy of the reports that
Dr. Murray has made on the outcome of that factual investigation?

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Answer: I'm a lawyer and I'm not in the position to make a judgment.
Correct?
A. Yes.
Q. You said a moment ago that you're now going
to give opinions in the area of business ethics, correct?
A. I'm sorry?
Q. You now want to give opinions in the area of
business ethics?
A. They're not really separate or divided. Legal ethics assumes and is interwoven with business
ethics.
Q. Do you intend to give opinions about the conduct of lawyers?
A. Yes.
Q. When I took your deposition on June 22, 1998,
you didn't understand that you were being designated as
an expert in business ethics, correct; you thought you
were being designated as an expert in legal ethics?
A. Legal ethics, to repeat, assumes the transactions of corporations, and they have to know
what business ethics is.
Q. Legal ethics deals with the conduct of lawyers and what conduct is ethical by lawyers,

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correct?
A. Except that we must assume that the lawyers are interwoven with business, and you can't say that legal ethics is just separate from business ethics.
Q. At your university, you're a professor at Georgetown University, correct?
A. Yes.
Q. And at that university there is a separate department that teaches business ethics, correct?
A. Not at the law school, sir, no.
Q. There's no department --
A. No. I teach business ethics every day in my course.
Q. What's the name of your course?
A. Professional responsibility.
Q. And professional responsibility relates to the responsibility of lawyers, correct?
A. But they are dealing with corporations and businesses almost every day of their life.
Q. All right.
Now, your CV, Father, let me show you that.
Let me show you a document entitled Supplement to Expert Witness List, which I can have marked for identification.
MR. SCHNEIDER: Mark for identification.

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THE COURT: He'll give you the number.
THE CLERK: 13 A.
(Defendants' Exhibit 13 A was marked for identification.)
BY MR. SCHNEIDER:
Q. Let me show you, Father, what's been marked for identification as Exhibit 13 A. This is a document entitled Supplement to Expert Witness List. And it attaches a copy of your curriculum vitae, correct?
A. Yes.
Q. Now, on your curriculum vitae, Father, you're listed in the Experience section as a professor of law at Georgetown University, specializing in international human rights, Constitutional law, civil liberties, professional responsibility and arms control, correct?
A. Yes.
Q. You're not listed on your C.V. in any

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respect
as being a specialist in business ethics?
A. No, but that professional responsibility
assumes that I bring in business ethics, which I
do
every day. I don't think there's any separation.
Q. But in your field of legal ethics, when
you're talking about conduct you're talking about
the
conduct of lawyers, correct?
A. In relation to business people.

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Q. The conduct of lawyers in relation to
business people, correct?
A. Which is the same thing as business
ethics.
Q. Any testimony you give in this case is
not
going to be separate from issues concerning
lawyers,
correct?
MR. ROSENBLATT: Well, I object to that,
because it depends on the questions I ask.
THE COURT: Well, that's the reason for
the
voir dire. Maybe I can cut it short a little bit.
I think where we're going with your
expertise
as a lawyer and your courses in ethics, teaching
lawyers or prospective lawyers, and you say that
the
course of legal ethics subsumes and assumes
business
ethics, I think the question is: Do you have any
expertise in the dealings of one business man with
another, rather than a lawyer with a business man
on
the field of business ethics?
THE WITNESS: A lot of interconnection.
Tomorrow I'll be teaching a section in
professional
responsibility which deals with the basic
question:
What does a lawyer do when he knows that the
corporation is on a course of fraud and
illegality? So
these are intertwined, and I never thought of this
before, that I don't teach business ethics.
Lawyers

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deal with businesses and persons and the law. So
that
I think that the whole issue is inseparable.
THE COURT: But excluding just the issue
of
lawyers dealing with businesses and lawyers
knowing

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what businesses are doing, two business men dealing with each other, the ethics of dealing in business, one business person with another business person is different than with a lawyer and a business person, or a lawyer representing a business person.

THE WITNESS: Yes and no. We have the basic criminal law that is binding on all corporate officers. We also have the increasing role of lawyers on corporate boards. 12 percent of all lawyers now are house counsel to a corporation, and when I bring that into my course, it's inseparable from legal ethics.

THE COURT: I understand all that. That's not the point. If one wanted to determine whether a particular business was following accepted business ethical practices, one would look to the activities of the business, right? They don't necessarily have to have a lawyer?

And the point is, if one wanted to assess the business ethics of a particularly-run business, one would look at it in the area of what the business is doing, not what the lawyers are doing with the

business, and assuming that they don't even have a lawyer.

THE WITNESS: But two business people dealing together have to abide by the law of the land, and they do have lawyers either before the event or during it. So once again, Your Honor, I don't think that they're separable. I can't image a lawyer not knowing about business ethics and counseling and learning a lot about it.

THE COURT: What I need to know is, as far as your testimony here today is concerned, is it that you're going to be testifying about the relationship between a corporation and its lawyer and the interrelationship between the two as it relates to

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ethical considerations of that business, be it legal or
business or intertwined?
THE WITNESS: Yes, Your Honor.
THE COURT: So that whatever it is that the
business did that involved a lawyer and vice versa,
whatever the lawyer did that involved the business
would be the subject matter of what you're talking
about?
THE WITNESS: Exactly, Your Honor.
BY MR. SCHNEIDER:
Q. And that would fall under the category of

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legal ethics, the relationship of lawyer and a
business, correct?
A. Probably, yes.
Q. Now, you understand under Florida law there's
no tort for breach of business ethics?
A. Yes.
Q. You also understand there's no count in this
complaint in this case for breach of business ethics,
correct?
A. I'm not certain.
Q. Now, the first time you discussed business
ethics with plaintiffs' counsel was in the last couple
of days, correct?
A. Yes.
Q. You've never run a commercial business; is
that correct, Father?
A. I was on a board of a corporation for five
years in Massachusetts.
Q. What corporation was that?
A. Purity Supreme. It's a supermarket.
Q. And in terms of you have no degree in
business ethics?
A. There is no degree.
Q. Don't you understand that there are schools
of business ethics, for example, at the Whorton School

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of Business?
A. Yes.
Q. And --
A. But there's no degree of business ethics.
Q. Are you able to tell me what the three

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school
of thoughts are in business ethics?
A. The three schools of thought. I think I can
imagine what they are.
Q. You've not studied textbooks on the schools
of thought, the three theories of business ethics?
A. I know them generally, but I haven't studied
them expressly. But I think that as an attorney I know
what the three theories would be.
Q. What are the three theories, Father?
A. I'm not certain that there's three classical
theories. You say that they are. Where is that from?
Q. I'm asking you, are you familiar --
A. I'm familiar with the theories, but I don't
think that they are de facto true as agreed to by
everybody.
Q. What are the theories?
A. As they deal with the law, you mean?
Q. The theories of business ethics to which
you're referring.
A. Well, I'm not certain that there's three

distinct approaches to this thing. They take all types
of approaches to it.
Q. What theories of business ethics are you
familiar with?
A. I'm familiar with the people who say that we
should be very cautious; we should not do something
that's contrary to the public good. And there are
other people who would say that we can sell anything
that's not forbidden by law and that we -- they
minimize their obligations under public interest.
Q. Now, Father, you're not a scientist, correct?
A. Law is a science.
Q. Well, outside law, you're not a scientist,
correct?
A. I'm a scientist in theology. I have a degree
in theology.
Q. You have no expertise in running a science
laboratory, correct?
A. I'm not a scientist.
Q. Now, the field of business ethics in schools
like Whorton talk about principles of right and wrong

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in business, correct?
A. Yes.
Q. Are you going to try to set yourself up as an expert on right and wrong in this case? Isn't that an

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issue for the jury to decide?
MR. ROSENBLATT: I --
THE COURT: I think we're getting a little bit outside.
BY MR. SCHNEIDER:
Q. Let me ask you, Father, with respect to your opinions in this case, you testified at your deposition that it was your opinion that lawyers have acted improperly in the tobacco industry, correct?
A. Yes.
Q. And I asked you to list at your deposition for me each specific event which you're relying upon as a foundation for that opinion, correct?
A. Yes.
Q. Can you list for me what you're relying upon as a foundation for that opinion?
A. Let me tell you about the case of Dr. Carl Seltzer. He was a professor emeritus from the Harvard School of Public Health. He was asked by lawyers for the tobacco industry to work for them and he did. And he put out contentions and allegations that the conclusions of the Framingham heart study were not valid.
I'm very familiar with this. Dr. Seltzer was a friend and a constituent, and with the Framingham

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study was in a town that was a member of my constituency when I was in Congress. I have followed that case very closely. It became public with press notices.
I think in that instance there that there was undue influence by the lawyers to suggest to Dr. Seltzer that he say something frankly he could not corroborate, when he challenged the findings of

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the
heart disease study at Framingham.
Q. Father Drinan, are you reading a document there?
A. No. I have nothing with me except what you gave me.
Q. Now, in terms of Dr. Seltzer, you say that he was asked by lawyers for the tobacco industry to make some statement?
A. Yes.
Q. What is the basis of your statement in that regard?
A. They set him after -- after he retired from the Harvard School of Public Health, they set him up at an odd place, namely at a museum with a secretary. They financed his trip to Australia where he spoke about smoking-related diseases. They gave him other subsidies through the years.

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Q. You said that he made a statement of some sort that he could not back up, according to you?
A. Yes.
Q. What statement are you referring to?
A. I'm referring to his statement and his testimony or his intervention with the MacNeil-Lehrer program where he challenged the results of this longitudinal study made in Framingham. They concluded some years ago that smoking does in fact lead to heart disease, and he challenged the validity of that statement.
Q. So you're referring to a statement made by Dr. Seltzer on a MacNeil-Lehrer television program?
A. And also articles and statements that he made.
Q. Let me focus first on the MacNeil-Lehrer television program. You say you heard a statement --
MR. ROSENBLATT: Judge, this is getting really absurdly far afield. Basically they're doing -- they want to try my case and they want to, you know, narrow Father Drinan to an area where I may not even be going.
THE COURT: The problem is, as I see it,

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I
think we're sort of doing this backwards. My intent,
in trying to find out what it was that Father Drinan

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was going to testify about, was to find out what it was
he was being presented for, to get an idea of the area.
MR. ROSENBLATT: Ironically, Your Honor, in
the supplement to expert witness list, where we
disclose Father Drinan's background, we never once say
that he's going to testify on legal ethics; that he is
a specialist in legal ethics.
If Your Honor reads over this, our whole
focus is on the misconduct of the tobacco industry. We
say that's what Father Drinan is going to testify
about. That's our whole focus.
Now, what they chose to do at the
deposition -- in a normal deposition you've got a
disclosure like this. Father Drinan --
MR. MOSS: These arguments --
THE COURT: Just a moment. Please, sir, I
understand where you're going.
He wants Father Drinan to be outside.
MR. ROSENBLATT: Fine.
THE COURT: Maybe it would be a good idea if
you would just step out for just a few minutes while we
discuss this, Father.
(The witness exits the courtroom.)
MR. ROSENBLATT: You see, Judge, we have
something very interesting going on here. And I

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suggest to the Court that it's all tactical. In terms
of the way the tobacco lawyers take depositions, it's
not the normal discovery deposition where you are
seeking information, where you are seeking opinions.
You could go through all these depositions.
The purpose of every deposition is to limit the
witness. That's what the purpose is, to limit the
witness, so that they can try the plaintiffs' case.
Now, any normal deposition, when faced with
this disclosure talking about the fraud, the

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misrepresentation: What are your opinions about that?
They never asked that. They never asked that. All they tried to do was zero in: Well, you're a legal ethicist. That's your field. You're not an expert in this. You're not an expert in the other thing.
My focus with Father Drinan is not going to be on lawyer behavior; it's going to be exactly what I've said in the disclosure: On the behavior of the business ethics, which, as he said, you don't teach legal ethics in a vacuum.
Father Drinan was the dean of the Boston College School of Law. He's had business experience. And I can go through his experience in Congress. He had oversight responsibilities with respect to the FDA. He is very sophisticated and knowledgeable about

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business practices.
And everything they're doing here I would suggest is a matter of cross-examination. They had the right at the deposition to say: Well, you know, you've been listed. This disclosure talks about terrible things the tobacco companies did. What are your opinions about that?
Not one question. Because what their purpose was, was to prevent him from giving opinions on that. We were very upfront, very forthright about this. The focus is --
THE COURT: Here's what the problem is. You have a lawyer employee or employer relationship and you have lawyers dealing with business people, and the allegation being that the lawyers overstepped the boundaries of the function of a lawyer and became either executives or administrators; and, therefore, we're outside the purview of what a lawyer should be doing. These are the allegations.
The companies knew this and even participated in this, according to the allegations, as a scheme for

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22 which to use the lawyers to be able to hide or prevent
23 disclosure of certain documents and certain activities.
24 These are the allegations that are coming forward.
25 So, in order to make that, actually show the

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1 proofs of that or to bring it forward, there will have
2 to be some testimony as to whether or not these actions
3 took place; this activity was available that the
4 companies knew it; that the lawyers knew it, and then
5 in concert, each with the other, they knew they were
6 violating, quote, "ethical principles" normally adhered
7 to by both businessmen and lawyers in their
8 interrelationship with each other. And I think that's
9 what we're talking about.
10 MR. SCHNEIDER: And Your Honor, what I was
11 going through was to show that there's no foundation
12 for any of that. I was going to ask him about each of
13 the opinions that he has and show he has no foundation.
14 Let me respond to a number of things that
15 Mr. Rosenblatt said, because they're incorrect. First
16 of all, we went to this deposition, and with the
17 disclosure in hand you can see that the first statement
18 says: It is very clear through the years the tobacco
19 companies have sought to abuse the lawyer-client
20 privilege as well as the work product rule issue about
21 lawyer privilege.
22 When I asked him several times in this
23 deposition what is his area, his area was legal ethics.
24 I did go through each of his opinions, contrary to what
25 counsel said.

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1 For example, Your Honor, I asked him: Now, I
2 want to ask you about each of the statements that are
3 made in this disclosure.
4 This is Page 119 of the deposition.

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On Page 1, first, sir, there's a sentence that states: It is very clear through the years that the tobacco companies have sought to abuse the lawyer-client privilege as well as the work product rule.

Do you see that?

Answer: Yes, I do.

And we have established that you are not able to give me a specific example of what you're referring to with respect to that statement, correct.

Answer: No. I think I gave you several examples where Shook and Hardy and other firms stamped the lawyer-client privilege on things that had no relevance, that were not entitled to that.

I went over each and he couldn't identify which document, what it contained.

As Your Honor said on Friday, the issue goes to whether the document is privileged and whether the document is admissible or not; an issue that's not before this jury and we're not here on today, number one.

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And number two, this witness, who wants to give opinions along the lines of what Your Honor said, has no foundation for them no basis for them.

Now, Your Honor, in your pretrial order, it says as follows, on Page 1: All expert opinions and the bases for such opinions shall be fully available for discovery at the time of an expert's deposition. After an expert's deposition has been taken, to the extent any expert seeks to materially change, modify or enlarge his opinion or rely upon additional material or change the bases for his opinion, any such occurrence must be accompanied by a notification to the opposing party within 24 hours of learning the same, and after such notification the other party may take a further deposition.

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16 The point is, I went through each one of his
17 opinions and asked him what the basis was, and you
18 heard me read to you on Friday. He has no basis.
19 In addition, the whole suggestion that claims
20 of privilege were made is an issue for Your Honor and
21 should not be before the court. We've cited case law
22 to that effect.
23 THE COURT: Two areas. Yes, that in and of
24 itself would be one aspect of it. But the other aspect
25 of that is to show that there was some concerted effort

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1 between the companies and the lawyers to do just that.
2 If it was just the lawyers act in saying:
3 Okay, in our legal opinion, us, the lawyers alone, that
4 this is, for example, work product or privileged
5 material, lawyer-client privilege, and that stood on
6 itself, then the Court can make that determination.
7 But I think what counsel is trying to say is
8 that it goes beyond that; that is, shows that there is
9 an interrelationship between the corporation and the
10 lawyers to do that kind of thing for that very purpose.
11 That in and of itself would take it just outside the
12 realm of merely deciding whether it was or was not a
13 privilege or violated any of the privilege rules. I
14 think that's what he was getting at. That was my
15 understanding of why he was bringing Father Drinan in.
16 MR. SCHNEIDER: But Father Drinan has no
17 foundation to say any of that.
18 THE COURT: I've got a whole list of
19 documents that they want to show him and use with him.
20 And whether or not they're successful in doing that --
21 he knows the document -- that I don't know. He just
22 didn't have the documents with him and said he couldn't
23 site them from the top of his head.
24 MR. SCHNEIDER: I had the documents with me.

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25 I put each one of them in front of him and I asked
him.

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1 Let me just read you an example.
2 THE COURT: Give me a page number and
I'll go
3 with you.
4 MR. SCHNEIDER: All right, I will. Let
me
5 take a look at Page 166, Line 14. And these are
the
6 documents --
7 THE COURT: Wait a minute. Mine seems
to
8 skip from 150 something to 170 something.
9 MR. SCHNEIDER: Here's another copy.
10 THE COURT: I don't have that section.
Mine
11 goes from 150 to 172.
12 MR. SCHNEIDER: I apologize for that.
Your
13 Honor, so does this one.
14 This is Page 166, Line 14: Let me ask
you
15 now about Exhibit 1101. I ask you, sir, does that
16 document form any part of the basis for your
opinion on
17 the subject of legal ethics, and if so, what is
your
18 opinion with respect to that document?
19 Answer: My answer would be the same.
20 Because he's given similar answers.
21 Question: And that means that --
22 Answer: I can't say what forms my
opinion.
23 There's a thousand reasons over 25 years that have
come
24 to my opinion now. Maybe this is one of them.
25 Question: There is nothing particular
about

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1 that document, correct.
2 Answer: Nothing particular, no.
3 Question: In other words, you don't
have a
4 specific opinion to give about that document?
5 He said: It's very hard to read. But I
6 don't at this moment.
7 Again, if you go through a number of the
8 documentation they cited on their list, I asked
him
9 similar questions. He had similar answers for the
bulk
10 of the documents also.
11 There's no foundation for his opinion.
I can
12 demonstrate that with a further line of questions.

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I
also would like the opportunity to demonstrate the bias of this witness.

And, Your Honor, that's particularly telling, because in your pretrial order, it says: All expert opinions and the basis for such opinions shall be fully available for discovery at the time of an expert's deposition.

If he's going to come in here now and say other things about the documents, additional facts, that's not proper.

MR. ROSENBLATT: See, I have a perfect understanding, Judge, of why Father Drinan became angry at his deposition. Because he wasn't being asked

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germane questions.

Now, there's a misconception here. Counsel repeats over: He's got no foundation for these opinions, because he cannot pinpoint a document. You bring in an expert; foundation are his life, study, everything he's done in his life. I do not have to rely on a particular document to create a foundation.

Now, Your Honor, going back to the hearing on Friday, you looked at the deposition. You went through the deposition. On Page 48, you said: Well, we really don't know what his testimony would be, what he would say in trial, because what you're doing here, by asking these particular questions, doesn't answer my question at all.

They deliberately and studiously avoided what we were saying in this disclosure. One of the things we said, it is very clear that tobacco companies concealed health risks by assigning, allegedly, scientific discoveries to attorneys where it was hoped they would be deemed privilege. The suppression of truth has been used by the tobacco companies as a symptom and sign of fraud.

He wasn't asked: What do you mean by

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that?
24 He wasn't asked any of those questions. Question after
25 question was: Well, you're only a specialist in legal

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1 ethics, and legal ethics was never defined.
2 What Father Drinan is saying: You don't
3 teach legal ethics in a vacuum. In order to teach
4 legal ethics, you've got to have an understanding of
5 corporate behavior, just as you would of criminal
6 behavior.
7 THE COURT: But, generally speaking, when
8 someone says: Look, what they did was wrong; the
9 relationship that A had with B, the lawyers in that,
10 then there's some specific examples thereof.
11 It's my understanding, you claim you have
12 documents that back that up; that this is what they
13 did; that some document will make a reference to what
14 the lawyers were doing vis-a-vis the company, and that
15 in and of itself would show that there was something
16 untoward being done by the lawyers.
17 Well, if that be the case, and he saw those
18 documents, he would say: Ah-ha, here's an example of
19 what I'm talking about, and these are the documents
20 that you want to use with him.
21 Apparently, according to the deposition, when
22 counsel showed him these documents, he never said the,
23 "Ah-ha, this is what I base." As a matter of fact, he
24 said: I really can't say. I don't have an opinion.
25 It's document after document after document

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1 in this deposition, as I read it now, in which that
2 occurs. Going beyond Page 166; 170, for example,
3 question: I may have given you two documents there.
4 What is the next number?
5 He says, answer: These are 1675 and 1676.
6 And you were looking at 1672 by Abe

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Krass?
Answer: Yes.
Question: Do you have any specific opinions with respect to either of these two documents?
He says: Not at this time.
So I don't understand that.
MR. ROSENBLATT: That's the technique. His answer is: My opinions are based, when I was in Congress I looked at thousands of documents. No, my opinion is not based on this document or that document.
THE COURT: I don't mean "solely based upon," but this would be one of the documents which is an example of what I'm talking about. He never even said that.
MR. ROSENBLATT: He can give examples from his experience. He does not have to be in the straight jacket of the documents.
THE COURT: Fine. If he can give examples, but up until this one that he just talked about today, that never came out anywhere. None of these things

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were examples.
If he were to say: Look, I don't know what this document says, and I can't give you an opinion, but I do remember this incident or I know of this incident or that incident, even though he may not be able to give you the title of the document, date and time.
MR. ROSENBLATT: Judge, where he's coming from is as follows, and you don't need documents. He accepts the fact that there is no scientific controversy on causation. He knows, without referencing any particular document, that historically for decades the tobacco companies have been pretending and misrepresenting that there's -- that to him is a fraud. He doesn't have to look at any particular document to say that.
THE COURT: But he says that --
MR. ROSENBLATT: That's his opinion. And for

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the lawyers to be engaged in pretending there is a scientific debate or controversy, when he knows from understanding what's in the Surgeon General's Reports and what's in the New England -- that's a fraud to him; that's unethical; that's unethical both from lawyers and scientific --

MR. MOSS: Judge, what we have here is a

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witness who wants to pre-empt the jury. Clear and simple, what Mr. Rosenblatt just said is, we have a person that accepts the fact, not an expert in bioethics; not a scientist -- Mr. Schneider got him to admit that finally -- that comes in here, I want to assume all of that, there's no controversy and based upon that it was a fraud for a lawyer to get up and suggest that it hadn't been proven yet. And Judge, nothing can demonstrate better the invasion of the jury's province that he intends for this witness, that's Mr. Rosenblatt's last argument. It is absolutely classic.

THE COURT: To a degree, Florida law does allow experts to give opinions on the ultimate issue of the question here, what the ultimate issue is, and how close to that line we're at.

But be that as it may, it's one thing to say: I do not accept the principle, that it is unproven, that's him personally saying: I don't accept that based upon everything I've read.

Then he's going to say: But if anybody disapproves of what I believe to be a fact, then they're being unethical.

Now, that's not necessarily the case and that's not necessarily something that I think an expert

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can say. One would have to say: Because, now, as my understanding of this whole case, the issue is not just the Surgeon General, and all those folks on that side of the issue are saying it is undisputed, and

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there's a
whole bunch of scientists and other people who say on
the other side that it is. It still is in dispute, and
regardless of what your evidence shows, we believe our
evidence shows the contrary, and therefore, there's a
conflict.
One could honestly disagree on that issue and
take action on that issue without engaging in a fraud.
What becomes the fraud is not the honest
dispute and the activities within the dispute, but
doing something that you know is wrong or not the case.
And devising methods to cover it up, hide it or
otherwise change it.
Now, that was my understanding of what you
alleged the tobacco companies did vis-a-vis the
lawyers. They said: Okay, I'll tell you what we'll
do. We don't want damaging information to be produced
in litigation. We don't want it out in the public. So
what we'll do is we'll put it in the hands of the
lawyers and by law we can protect it as work product
and attorney-client privilege.
If they said that, if they did that, if they

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conceived that, that might in effect be exactly what
you're talking about, a fraud.
Then if they did something beyond that and
they said: Well, in order to do this and cover it up,
what we will do, we, the lawyers, will take control of
the allocation of the funds for CTR or TBR, or whatever
it might be, and we'll control the research, and we'll
make darn well sure there isn't anything adverse to our
position. And if it does come out adverse to our
position, we'll do one of two things; we'll ship it out
to another country where it's unattachable, or keep it
among ourselves where it's attorney-client privilege,
or we could even get involved in destroying the
evidence.

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But having an honest disagreement as to whether or not medical science and the scientific world says there's proof positive, and part of the medical and scientific world says no, it's not proof positive, that's an honest dispute over which I'm sure he can't say that's fraudulent and that's unethical.

The other stuff might be, if you can prove it. The question is, how can you prove it? Can you prove it through him? Is he the one to outline it? Did he find it and say, yes, I've seen by this document, that document, this mode of action through

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the years, this is what they actually did, and therefore, if they did that, that's unethical?

That's the thing we're looking for.

MR. ROSENBLATT: We have testimony from Dr. Farone, from Dr. William Ray Morgan that that's precisely what was done.

THE COURT: But how about Father --

MR. ROSENBLATT: He's entitled to answer hypothetical questions as an expert.

THE COURT: You're going to give him a hypothet, if A and B and C exists, what does --

MR. ROSENBLATT: Correct.

THE COURT: But he doesn't have direct knowledge that those things happened, nor did he read about it -- the basis of what I see in the deposition is that he read The Cigarette Papers. It's a book.

MR. ROSENBLATT: It's a book of documents.

THE COURT: It's a book of documents; part fiction, part not maybe. Nobody knows what it is. But there are just gobs and gobs of citations to various documents within the book, The Cigarette Papers.

Take those particular documents each by themselves, if he had read those documents and said: Look, I read The Cigarette Papers. It led me to that document.

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Obviously, it was available on the

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Internet.
If he did read these documents, he could say: Okay, this is what forms the basis of my opinion, not the book, but the documents contained therein. And when I read these documents, he could say "ah-ha," if these documents do in fact exist, and they say, what? They say, ergo, there has been a violation. That's different. But that's not what he's saying.

MR. SCHNEIDER: When plaintiff said I did not ask him about his opinions, again, each one I went through.

It is very clear that tobacco companies concealed health risks by assigning allegedly scientific discoveries to attorneys where it was hoped they would be deemed privileged.

That's a sentence I'm reading from Page 139.

THE COURT: Well, this is a very crazy thing here. This skips also.

MR. SCHNEIDER: In mine?

THE COURT: Okay. I've got yours.

MR. SCHNEIDER: 139. It's a question at the top of the page, Page 1 -- I mean Line 1. I'm reading from his disclosure.

It is very clear that the tobacco companies concealed health risks by assigning allegedly

scientific discoveries to attorneys where it was hoped they would be deemed privileged.

That's a sentence quote from the disclosure that describes your opinion.

Question: It says the tobacco companies concealed health risks by assigning allegedly scientific discoveries to attorneys where it was hoped they would be deemed privileged.

That's right.

Can you give me one specific example?

Again, sir, it's all in the documentation. You're asking me to remember what page this was on. This is common knowledge in all the literature concerning ethics of the tobacco people. This was a regular practice that went on.

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16 If you want a term paper about this, I could
17 do that. This is a generalization that it is very
18 clear that everybody admits that this was done. And
19 some of the lawyers probably would have to admit that
20 they did it.
21 And then I say: Father Drinan, let me ask
22 you this question in fairness to your role as a legal
23 ethicist in the case.
24 If I presented evidence to you that there are
25 not any scientific discoveries that were improperly

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1 assigned to attorneys under the hope that they would be
2 deemed privileged, if I produced that evidence to you,
3 would you conclude that your opinion here is incorrect?
4 Answer: No.
5 Which is a bias problem I'll get to in a
6 moment.
7 If you turn to Page 132, Line 23, Your Honor.
8 THE COURT: Who says that an expert can't be
9 biased?
10 MR. SCHNEIDER: Well, I think you can cross
11 an expert with respect to bias.
12 THE COURT: Yes. You can cross him.
13 MR. SCHNEIDER: I have a case from the
14 Seventh Circuit, I'm going to give you, that when an
15 expert admits bias, it's inadmissible. But we'll get
16 to that in a minute.
17 You notice his answer on this page, his
18 answer on Page 133, Line 6 -- Line 1, excuse me.
19 Answer: That's passed into history. I'm not
20 here, sir, to indict particular lawyers or particular
21 companies. I'm here as an expert in legal ethics to
22 say here are the things that were violated by lawyers.
23 As Your Honor has pointed out, and is clear
24 from the record, there's no particulars. I had
25 mentioned the issue of bias because there is an article

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that Father Drinan wrote which he calls: The Tobacco Companies' Evil. He says: If you ask me if I'm a zealot, I plead guilty. I want the tobacco companies banished.

THE COURT: Sort of obvious from his deposition and the statements he's made. I'm really not immune to that comment. The tenor is, yeah, I feel that he is highly -- what's the word I want to use? I want to stay away from the word biased at the moment -- but opinionated to the negative side of the tobacco.

MR. SCHNEIDER: The reason I raise it is there's a case called Stachniak versus Hayes, 989 F.2d 914, Seventh Circuit, 1993, in which a witness, an expert witness in that case, admitted some bias, and here's a passage from the court: Furthermore, the district court excluded Bowman's expert testimony in reliance upon Bowman's stated bias. At his deposition, Bowman stated that he "would probably weigh his opinion in favor of the police as opposed to that of persons who were arrested or involved in the arrest itself." We have stated that credibility is not a proper subject for expert testimony; the jury does not need an expert to tell it whom to believe, and the experts' stamp of approval on a particular witness' testimony may unduly influence the jury. The district court correctly

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concluded that Bowman's obvious bias disqualified him as a witness.

THE COURT: If the bias affects his opinion. One could give a scientific explanation of a scientific fact without showing a prejudice or bias. Utilizing that into then something else might affect an opinion and bias.

In this particular case, I have a real problem with this, I'll be perfectly honest with you,

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counsel; that it's flat out there. It's black and white on the paper when I read the deposition, and I couldn't find anything in it that would substantiate any of the things he said other than: I read it for the 20, 30, 40 years, and the pattern has been shown to me and this is my opinion and this is what the tobacco companies and the lawyers have done and it's reprehensible.

That's basically what he's saying.

MR. SCHNEIDER: And no foundation. For all the reasons we've previously pointed out --

THE COURT: But I haven't heard from him yet, see? I want to hear what questions are going to be asked of him. That's what I want to know.

Why don't you just yield at this time? I'll let you have your time to come back. But I want to

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find out exactly what it is he's going to say, as compared to what he said in the deposition. Might be two different worlds. But let's see what he says and how he says it.

MR. SCHNEIDER: Fine, Your Honor. On that topic, two points. First, I'm going to give Your Honor a copy of a case called Paley versus Federal Home Loan Mortgage Corporation, Eastern District of Pennsylvania, July of 1994 -- here's a copy for you, Stan -- in which the court says, on Page 3 of the Slip opinion: Defendant's motion to preclude expert testimony will be granted for the following reasons.

THE COURT: We'll get to that after I hear from him.

MR. SCHNEIDER: This is a business expert --

THE COURT: Let me first hear from him, what he says and how he says it. He may not.

MR. SCHNEIDER: One other point with respect to that. If he now says things different from his deposition --

THE COURT: Fine. I'm going to give you

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a
22 chance to come back after I hear this and argue those
23 points, but I think we're arguing sort of backwards.
24 Let's first find out what he's going to say, then we'll
25 found out if that's appropriate.

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1 I don't want to get into every word he's
2 going to utter, but the general tenor of the questions.
3 Otherwise, we're going to be here two hours on voir
4 dire.
5 I just need to know where you're going with
6 him. Let's put it to you this way: If he's going to
7 talk in those generalities, I've got a real problem
8 with it.
9 MR. ROSENBLATT: My hypothets are going to be
10 very specific. My hypotheticals are going to be very
11 specific.
12 THE COURT: Hypothet, as you know, has got to
13 be bottomed upon testimony already in evidence at
14 trial, and I always worry about -- and expected to be
15 induced at trial. But as you know, the general tenor
16 is courts are trying to get away from hypothets,
17 disapproving basically of their use because there's so
18 many abuses because of hypothets. Let's first find out
19 what you're going to say.
20 All right. Bring in the Father, please.
21 MR. ROSENBLATT: And I just want to go
22 through some background with him as well.
23 THE COURT: Well, in the area of his
24 expertise to give opinions regarding the relationship
25 between lawyers and business people, and what

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1 businesses do, providing they did it with lawyers.
2 MR. ROSENBLATT: Well --
3 THE COURT: I know, it seems restrictive, but
4 I'm sorry.
5 (The witness entered the courtroom.)
6 Just have a seat, sir.
7 VOIR DIRE EXAMINATION
8 BY MR. ROSENBLATT:

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Q. Father Drinan, I'm going to just ask you a few brief background questions before I get to the heart of what we're dealing with.

What year did you obtain your law degree?

A. 1950.

Q. And from what institution?

A. Georgetown University Law Center.

Q. And when were you the dean of the Boston College Law School?

A. 1956 to 1970.

Q. And how long have you been a professor of law at Georgetown University?

A. Since 1981.

Q. Now, you've held various positions and been on various committees, both with the American Bar Association and the Massachusetts Bar Association; is that correct?

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A. Yes.

Q. Now, during what time frame were you in the United States Congress and the House of Representatives?

A. '71 to '81.

Q. You were a member of the House committee on the judiciary?

A. For 10 years.

Q. What was the government operations committee?

A. I was on that for six or eight years.

Q. And what responsibility, if any, did you have with the Food and Drug Administration when you were in Congress?

A. One subcommittee has oversight functions of the FDA. We held hearings and talked with all of them, tried to be helpful to them, and also listened to the complaints about the FDA.

Q. Were you, as a member of Congress, involved in reframing some of the laws relating to the subject of bankruptcy?

A. The House judiciary committee and eventually the whole Congress redid the whole bankruptcy law. I think it was a distinct improvement.

Q. And you were intimately involved in that?

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A. Too much.

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Q. What, if any, responsibilities did you have while you were a member of Congress on the subject of antitrust?

A. I followed the Rodino-Hart Bill very closely. I learned a lot about monopoly. I participated actively in the formation of improved laws.

Q. Now, Father Drinan, I want you to assume that we've had testimony at this trial, through former United States Surgeon General Julius Richmond, Dr. Ronald Davis, Dr. David Burns, and other public health officials, who testified that the tobacco industry refused to cooperate with them and other public health officials regarding issues of smoking and health since issuance of The Frank Statement in 1954.

I want you to further assume that in The Frank Statement the tobacco industry pledged that support and cooperation.

And this is a blow-up of The Frank Statement where the tobacco industry promises: We always have and always will cooperate closely with those whose task it is to safeguard the public health.

And two Surgeon Generals in this case have testified, as well as other officials in the area of public health, that that promise was violated and that the tobacco companies basically did the opposite over

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the years and did not cooperate with them.

Now, Father Drinan, based upon your training, education and experience and your review of tobacco documents, based upon reasonable probability and certainty, is that an appropriate and ethical position for an industry to take?

A. No. I think they broke their promises. I'm very familiar with the Frank report, and since that time they have gone the opposite way. And they have

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not, in my judgment, not even attempted to comply with The Frank Statement.

Q. And from the standpoint of someone who teaches legal ethics to law students and relates the subject of legal ethics to corporate behavior, why is that corporate behavior unacceptable or unethical?

A. Well, it's unacceptable because they have a product that is intrinsically wrong for people that has no redeeming feature. The purpose -- if you follow the basic purpose of cigarettes, it will be -- will have a bad effect on you.

So when you are marketing something like that and you make solemn promises and advertise them to the whole country, it's clearly unethical and wrong to go against your basic promises.

Q. Now, Father Drinan, I want you to assume that

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former U.S. Surgeon General Julius Richmond testified that since the Surgeon General's Report of 1964, there has been no controversy in the medical and scientific communities that smoking causes lung cancer.

I want you to further assume that the CEOs of Philip Morris, American Tobacco, Brown & Williamson, R.J. Reynolds and Lorillard have testified under oath, and their position at this trial is that it has not been scientifically proven that smoking cigarettes causes lung cancer.

I want you to further assume that the evidence has shown that the tobacco industry has repeatedly refuted the medical science that has emerged since 1954 linking smoking to disease, including each of the Surgeon General's Reports.

Based upon your training, education and experience, and based on reasonable probability and certainty, is that position taken by the tobacco companies an appropriate and ethical position for this industry to have taken over the past several decades?

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A. No.
Q. And why not?
A. Because they know, they have to know, that there is overwhelming evidence that cigarettes and smoking cause all types of medical problems. That has

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been the overwhelming consensus of the public health community, the American Medical Association, the Lung and the Cancer Society, of every Surgeon General, and more and more of public interest. Consequently, I think that's an inherently irresponsible position for the seven tobacco companies to maintain.
Q. I want you to assume that their position is: Look, that's our opinion. We live in a democratic society. We just don't accept the Surgeon General Reports. And we don't accept what the great majority of the people in the medical and scientific -- don't we have a right to disagree and to express our opinion and to try to convince the American public that maybe we're right and causation has not been proven?
A. They've implicitly gone against that by agreeing to 208 billion dollars in rep --
Q. In terms of the attorney general --
A. Exactly.
Q. Now, Father Drinan, I want you to assume that there are various tobacco documents that reflect that as early as the 1960s, tobacco companies were aware of the effects of nicotine and the effects on the brain, but failed to reveal that information to the United States Government, the United States Surgeon Generals, and the American public.

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I want you to further assume that the tobacco industry has stated publicly that nicotine is not addictive, and when they know the opposite to be true. I want you to further assume that Dr. William Farone of Philip Morris, who was the director of applied

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research
there from 1976 to 1984, testified that it was known in
Philip Morris by all of the scientists that nicotine is
an addictive drug.
Based on your education, training and
experience, and based upon reasonable probability and
certainty, is this an appropriate and ethical position
for the tobacco industry to have taken over the past
several decades, to deny the addictive nature of
nicotine?
A. No.
Q. And why is that?
A. Because they know that under every ethics of
business and of law and of decency they have to reveal
to people that this is a very dangerous substance.
They are required by law to put a label on, but that
label apparently is insufficient.
So I would think that any industry has some
obligation to inform the people that use these products
of the inherent dangers.
Q. And I want you to assume, Father Drinan, that

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a former Philip Morris scientist, chemist, who has a
Ph.D. in chemistry, Dr. William Ray Morgan, has
testified by video deposition in this case -- could you
keep --
THE COURT: Proceed.
BY MR. ROSENBLATT:
Q. I want you to assume that Dr. William Ray
Morgan testified by video deposition in this case that
he was directed by Philip Morris to destroy the results
of a scientific test that revealed a very high level of
nitrosamines in a commercial Philip Morris cigarette.
Based upon your training, education and
experience, and your review of tobacco documents, and
based on reasonable probability and certainty, is that
an appropriate and ethical position for Philip Morris
to take?
A. I would say no.

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Q. And why is that?
A. Because this man is a reputed scientist. He knows what he's doing and he has said these things, and they have not been contradicted by the tobacco industry. So I think the assumption or the presumption is that the doctor is correct.
Q. I want you to assume that there is evidence in this case, through the testimony of Dr. Farone and

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Dr. Morgan, that Philip Morris prohibited any safety tests in the United States of commercial cigarettes. And that sensitive testing relating to issues of smoking and health and the subject of addiction were, in fact, farmed out to a company called INBIFO in Germany, which hardly anyone in the American public knew about, and very few Philip Morris employees knew about.
Based upon your training, education and experience, and your review of tobacco documents, and based upon a reasonable probability and certainty, is that an appropriate and ethical position for an industry to take?
A. No. I would say no; that they have been in a patent procedure of suppressing evidence. Here's another instance where they don't want the truth to come out. They are hiding it from the American public by devious means, and I would think that it is not appropriate.
MR. ROSENBLATT: This is merely a sampling, Your Honor, of the kinds of hypothetical, the animal testing, based on the use of code words I would go through. If Your Honor wants me to, I can. But I've given you a sampling of the kinds of hypothetical questions based upon documents that are or will be in

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evidence, based on the testimony of Dr. Farone, Dr. Morgan, Dr. Uydess, who we have not heard from as

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yet, and others. And the predicate is there.
MR. MOSS: Judge, could we address this outside of the witness for a moment?
THE COURT: If you don't mind stepping outside again.
(The witness exited the courtroom.)
MR. HEIM: Your Honor, quite aside from the propriety of saying, assume that Dr. Farone testified as a matter of a legal issue as to what you can or cannot do with a hypothetical and referring to a witness's testimony, I would just simply start by saying that my belief is that the questions also mischaracterize much of what Dr. Farone said and also the situation with regard to Mr. Morgan.
Let me give you an example of what I mean by that. I don't believe Dr. Farone said that all the scientists at Philip Morris believed that nicotine was an addictive drug. You'll remember at the very end, for example, of Dr. Farone's testimony I wanted to impeach him with a deposition from another case where Dr. DeNoble testified that while he was at the company, he didn't believe that nicotine was an addictive drug. And Your Honor didn't permit me to do that because Your

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Honor said no, the witness said he changed his opinion after he left the company. So at the very least, Dr. DeNoble didn't believe and there were other doctors as well.
I don't think you can ask anybody to assume testimony that's wrong. Same thing with regard to Mr. Morgan. Father Drinan's testimony that the companies have never contradicted that Dr. Morgan was told to destroy that one single test, I believe there's sworn deposition testimony in other cases that the companies have contradicted that. And there's also preemption problems with him saying that Philip Morris didn't warn the public with regard to testing.
So there's lots of problems with what he says, and on the legal side of it.
MR. MOSS: Judge, let me just, in answer to each one of Mr. Rosenblatt's -- let me get to what I

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18 think is the guts of this and why this testimony, why
19 what Mr. Rosenblatt did, clearly establishes that this
20 type of testimony should not be permitted in this or
21 any other courtroom.
22 In response to every one of the questions
23 beginning with -- the doctor first of all says, well,
24 causation has been proven. We know that he does not
25 have the basis to make that judgment, whether he gets

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1 it through a hypothet or whether he gets it through his
2 own investigation, because he's clearly demonstrated on
3 the deposition and this morning, he has no basis.
4 The next thing he says: That's an inherently
5 irresponsible thing to do. Which clearly, no witness
6 can venture that type of an opinion, because what
7 you're doing is telling the jury how to decide it.
8 He then, in response to another question,
9 says: Well, it's obvious that they knew because they
10 settled.
11 This is a lawyer. This is a professor of
12 law, a legal ethicist who, you know, in the face of the
13 federal and Florida statute prohibiting evidence of
14 settlements to prove liability, I mean, you can't.
15 There's no court in the country that will allow it.
16 His answer to that question is: Hey, they settled.
17 Shut the door. Nothing else they say is to be
18 believed.
19 He does the same thing on addiction. He has
20 no basis.
21 What we have here -- and let me just go on
22 with the others. He then, in answer to another
23 question: There's no question the companies knew.
24 He's now a witness on the state of the
25 company's knowledge. And this is the reason that

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1 Mr. Rosenblatt calls it a tobacco company tactic to try

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to pin a witness down.
What is the basis on a deposition of your opinion? What are you relying upon to say they knew? It's not a trick. It's not a tactic. It's the way any reasonable lawyer would go about when you have a witness that simply is willing to volunteer all of these conclusory opinions and instruct the jury.
You've got to be able to find out so we can show the Court that what we have here is simply someone that wants to advocate a position and basically say in conclusory terms, "They knew," which a witness can't do.
He says, they've been in a pattern, in answer to another question of Mr. Rosenblatt's, of suppressing relevant evidence. The witness can't come in here and talk about that. In other words, that's telling the jury how to decide the case.
They've been hiding by devious means. Again, conclusory statements without any factual basis.
Now, when we go through -- and what I want to get to is a long line of cases. I know I've cited them to you before. These are other ones, Your Honor, that simply say that this type of conclusory testimony by an expert -- an expert is not a truth witness. There is

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no such thing as a truth witness. There is no such thing as a fraud witness. There is no such thing as a hiding or secretion witness.
There are witnesses that have a factual background to say: This document shows that this test result was kept from A or kept from this group. That's what an expert may be able to do. But, of course, there doesn't appear to be any need for expert witness testimony on that if they have the document.
But to bring in a witness that basically is going to make somewhat of a closing statement in his

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answer to these hypothetical questions from Mr. Rosenblatt is incredibly improper.

Let me begin with U.S. versus Scott, which is the Second Circuit opinion, 1988, 846 Fed 2nd 135, where the Court allowed a government witness on securities to testify that the defendants engaged in a, quote, scheme to defraud, and quote, they manipulated, end quote, the stock.

The Second Circuit reversed finding that the expert testimony embodied legal conclusions which included the ultimate scope. The rules were not intended to permit an expert to offer legal conclusions, which is all of what he is doing here.

Your Honor, I know that you've heard -- this

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is the Paley versus Federal Home Loan decision, which I think you have a copy of, Your Honor.

THE COURT: I don't have it handy.

MR. MOSS: It's a 1994 decision, which is cited at 1994 WL 327659. Defendant's motion to -- on Page 3, Your Honor of that opinion, in the right-hand side, Section D: Defendant's motion to preclude expert testimony.

I quote: Defendant's motion to preclude expert testimony will be granted for the following reasons. Plaintiffs have produced a report prepared by W. Michael Hoffman, Ph.D., entitled Report of Business Ethics Expert, and have identified Hoffman as an expert witness in this trial. The Standard for expert testimony is whether scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.

And they cite 702, which is basically our rule as well.

The subject matter at issue is well within the knowledge, experience, and understanding of the ordinary jury. Expert opinion on the issue of bad faith and breach of fiduciary duty is not necessary to assist the fact finder in this action.

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Your Honor, there's a whole line of cases in addition to the two I've cited. U.S. versus Simpson, which is a Tenth Circuit decision, 1993, 3 Fed 3rd 186, where a witness was allowed to testify as to misapplication or concealment of funds.

Each of the cases I've cited, the Second Circuit and the Tenth Circuit, reversed the trial court for allowing such testimony.

And what we have here is even a clearer example, and it was demonstrated by the type of testimony that the plaintiff intends to elicit from this witness: These are bad people and they shouldn't be doing things like this and in my opinion, blank, blank, blank. He has absolutely stepped into the jury box in telling this jury how to decide this case.

There's nothing in here that fits within his disclosure. His disclosures, there are two of them, nothing.

We now have a witness that has amorphously shifted into the truth sayer here, and he's going to tell this jury how to decide this case, because he's concluded that these are really, really bad people and they shouldn't be doing all this.

THE COURT: Thank you.

MR. ROSENBLATT: Father Drinan's opinion that

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they are really, really bad people is immaterial to his opinions. His opinions are based on a very simple premise. There is evidence in this record, when I ask the CEOs -- they talk about this controversy, this debate. I think I've said to every one of them: Name me one scientist who's never gotten 10 cents of tobacco money who believes what you just said? They cannot come up with a name.

There is no controversy. That's a fact; that's not an opinion. This is a controversy only

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in
11 the minds of the American Tobacco industry and
people
12 that they have paid money to.
13 Now, Father Drinan's position is that
when an
14 industry inhouse knows their product causes
disease and
15 they deny that to the public, that's fraudulent.
When
16 an industry knows their product is addictive and
they
17 deny that to the public, that's fraudulent.
That's the
18 basis for his opinion.
19 And in this concept of telling the jury
how
20 to decide a case, in the garden variety-type of
21 malpractice case, medical malpractice case, both
sides
22 put on experts: Did he fall below the reasonable
and
23 acceptable standard of care? There are
countervailing
24 opinions on it. That's the bottom line question
the
25 jury has to answer. That's the question they
answer.

15746
1 If you don't feel that the defendant fell below
2 reasonable and acceptable standards of care, then
your
3 verdict is for the defendant. So there's nothing
4 unusual about that.
5 And what's unique about the tobacco
industry,
6 Judge, is that starting with Addison Yeaman and
others,
7 many of the officials of the tobacco companies
are, in
8 fact, attorneys, and as Father Drinan says, he
teaches
9 business ethics at Georgetown University, one of
the
10 finest law schools in America, every day because
it's
11 intertwined. It's inseparable.
12 And I laid it out in our disclosure that
he
13 was going to testify about the fraud and
misconduct of
14 the tobacco industry, and that's what he's
prepared to
15 do today.
16 THE COURT: Let's take a short recess.
I'm
17 going to mull it over.
18 (A brief recess was taken.)
19 THE COURT: All right. Have a seat,
please.

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The Court at this time is faced with a very difficult choice. I understand the importance to both sides of the issue. But after due consideration, considering the arguments of counsel and the case law cited, the information received in the deposition, the voir dire examination, and the Court's consideration of

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all of the factors, and the testimony and the indication of the testimony as to what it would be, the Court is inclined at this time to grant the motion regarding Father Drinan's testimony and disallow his testimony in the case, which is not to say that he would not be available for rebuttal in the event that that issue comes up.

But on the overall scheme of things, I think the testimony of the doctor -- I mean of Father Drinan, is not of the caliber and quality for this particular purpose in this particular case under these issues that is required of an expert in his field under the conditions that it was purported to be.

Takes nothing away from Father's knowledge, from his expertise, from his experiences and certainly from his motivation. It's just it doesn't fit in with this particular case under the circumstances.

Reluctant as I may be to not have the good Father testify in this case, I'm going to have to abide by that rule.

I apologize to you, Father, for coming down. It could be that you may be available later, but I don't know. That's a matter that you have to discuss with counsel.

All right. If you need a few minutes.

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MR. ROSENBLATT: Yes. What I would plan on doing now, Judge, the only other live witness that we have this week is Dr. Uydess. I will be prepared

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in a
few minutes to show the edited video version of Mr. Morgan.
THE COURT: We'll take a short recess.
MR. HEIM: Your Honor, I don't know whether you want to do it now or not, but there is an issue with respect to Dr. Uydess.
THE COURT: Let's hold off for a few minutes. I'm sure that counsel needs a few minutes.
MR. HEIM: I'm sorry. Certainly.
(A brief recess was taken.)
THE COURT: Okay. What is the stature of our case?
MR. HEIM: Your Honor, the issue I wanted to raise briefly on the subject of Dr. Uydess, who will be the next live witness -- I understand that what we're going to do now is show a video.
THE COURT: Of?
MR. ROSENBLATT: James Morgan, the former CEO of Philip Morris.
THE COURT: We've already been through that.
MR. HEIM: Yes, we've been through that, but I did want to rise that issue so we knew what we we're

15749
going to do with Dr. Uydess. I think I can do this in a pretty short order, if I may.
THE COURT: I worry about the jury being in there all this time.
MR. HEIM: Well, why don't I present the issue and if Your Honor would rather wait until lunch time to deal with it.
THE COURT: It's already 10:30. They've been there an hour. They don't know what's going on. I hate to keep them doing nothing.
MR. HEIM: Shall I alert you to what the issue is?
THE COURT: Alert me to what the issue is.
MR. HEIM: Your Honor will recall that last week, Thursday or Friday, I don't remember which, I had asked the Court for permission to take a short deposition of Dr. Uydess when he arrived, and Your

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Honor granted that. And in the course of asking for that --

THE COURT: Hold on.

MR. HEIM: I said that the deposition would be brief because it would be limited to his disclosure. And his disclosure was that he was going to talk about nicotine manipulation and the company's knowledge of nicotine, the importance of maintaining nicotine levels

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to keep smokers smoking. That was his disclosure.

Then Friday afternoon around 3:00, we got a much longer disclosure, and counsel said that they were unaware of any earlier disclosure that had been made.

I showed the Court the earlier disclosure that had been made with regard to Dr. Uydess, which had been in effect since May of 1997. And then counsel said: Well, that was a voluntary disclosure, since he was a fact witness.

And since I wasn't sure about what I was talking about, I decided not to say anything at that point because I couldn't remember whether there had been a Court order on this or not.

But I did go back and, in fact, discover that there was a Court order that required these disclosures, and up until Friday afternoon the disclosure that was in effect was that he would talk about the manipulation of nicotine and Philip Morris' knowledge of the importance of maintaining nicotine levels to keep smokers smoking.

Now, that deposition is taking place right now as we speak. My intention was to limit that deposition to that subject since that was the subject of his disclosure.

And that's really the issue I wanted to

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raise, whether Dr. Uydess is going to now be

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permitted
to go beyond what his disclosure has been for the last
16 months.
I know that a good part of his testimony is
going to be on that anyway. But whether he can range
into all these other areas that got put in the letter I
got at 3:00 on Friday is the issue that I wanted to
raise with the Court.
So my guess is that the deposition on the
subject matter of the earlier disclosure will probably
take until lunch time anyway. If we take it up at
lunch time, rather than now so we can get the jury out,
it would probably work out fine.
THE COURT: I wonder if we have enough time
to do that.
MR. HEIM: What I'm saying is they started
taking his deposition this morning. And if Your Honor
rules that he is limited to what his previous
disclosure has been, then I will terminate that
deposition. And if Your Honor doesn't, then, of
course, I'm going to have to ask them to expand into
what we got on Friday afternoon.
I believe he should be limited to it. It's a
broad enough subject as it is. And the fact is, he's a
fact witness, not to offer opinions.

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THE COURT: Since I don't know what he's
going to say.
MR. ROSENBLATT: Judge, very similar to
Dr. Farone in that he is a scientist; he worked for
Philip Morris, actually longer than Dr. Farone did, for
a total of about 11 years.
What counsel is referring to is I wouldn't
even elevate it to a disclosure. It was voluntary.
He's a fact witness. In an abundance of caution, it
seems like we're supposed to get penalized for acting
in good faith, giving them more than we have to give
them.
Friday I hand-delivered a letter. Of

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course,
we want him to be testifying about his 11 years at Philip Morris. And they opposed him -- again, limit, limit, limit, so they shouldn't have to cross-examine.
They just want to limit our people and try our case, and really, it reaches a point of exasperation.
Judge, the man is a scientist. They've got reams and reams and reams of testimony of Ian Uydess from other cases. He's been on 60 Minutes. They know infinitely more about him than I do.
THE COURT: The only thing is, is he going to be expressing opinions? If he's going to be expressing

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opinions, I would say they have a case. But if you're bringing him as a factual witness and factual matters that --
MR. ROSENBLATT: I think there's always -- I don't care. Let them take his deposition all day; I don't care. Because I've got to talk to him, I've got to talk to the lawyers who are with him. I've got to read over. Even if it's a four-hour deposition, I'm planning on putting him on first thing tomorrow morning.
MR. HEIM: Just so Your Honor knows, I'd like to keep it right. It wasn't a voluntary disclosure; it was a Court-ordered disclosure. I can give Your Honor the order if you want it. So this voluntary disclosure thing is wrong. The purpose of the Court order disclosure was to tell us what he was going to testify about.
THE COURT: Yes, but, different if he's a fact witness vis-a-vis an expert.
MR. HEIM: He is a fact witness.
THE COURT: If he's a fact witness, you can't expect him to say every fact he's going to testify about. If he's going to express opinions, then you

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24 should know what the opinions were, such as Father
25 Drinan didn't have the opinion, background or
support

15754
1 that normally is required of an opinion expert.
2 So in this regard, take your deposition
and
3 follow it through and complete it.
4 MR. HEIM: I will do that, Your Honor.
I
5 will take his deposition as a fact witness,
because
6 that's the way he's offered, as a fact witness.
What
7 did he know when he was at Philip Morris? How did
he
8 know it?
9 This witness, by the way, just so you
know,
10 Judge -- I know we want to get the jury out here -
- was
11 not like Dr. Farone. He was much lower in the
company.
12 THE COURT: There may be certain facts
he
13 became aware of after he left, which still makes
him a
14 fact witness. The only other thing, it may be a
fact.
15 The question now is whether or not that's
supportable
16 by other rules and whatever.
17 MR. HEIM: There would be a lot of
hearsay
18 problems with what he learned after.
19 THE COURT: Maybe, maybe not. There's a
lot
20 of things that appear to be hearsay that don't
turn out
21 to be hearsay because of other rules.
22 Go ahead and take your depo. Finish it
up.
23 MR. HEIM: Will do.
24 THE COURT: Are we ready for this?
25 MR. ROSENBLATT: Yes, Your Honor. I
think

15755
1 it's about an hour and a half, which should take
us
2 shortly after 12:00.
3 THE COURT: All right. Let's get the
jury
4 out here.
5 (The jurors entered the courtroom.)
6 THE COURT: Okay. Good morning, folks.
7 JURORS: Good morning.
8 THE COURT: Have a seat, please. We

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didn't
forget you. How could we forget you?
We have been working, doing what we're supposed to be doing. We've been here since 8:30 getting things done. And we finally got to a point now where you'll be able to hear a deposition. This I think is the deposition of a James J. Morgan.
MR. HEIM: President of Philip Morris at the time.
THE COURT: An employee of Philip Morris at the time.
MR. HEIM: President.
MR. ROSENBLATT: President. And this deposition, Judge, was taken April 17 of '97.
THE COURT: Okay. Anyway, over the recess, has anybody been exposed to any radio, television, newspapers, magazines, written or oral information from whatever source regarding anything relating to tobacco,

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the trial and what have you? Anybody?
JURORS: No.
THE COURT: And for you Gator fans, we're sorry. For you Seminole fans, congratulations. But that's as far as it goes with football.
All right, folks. Go ahead.
(The videotaped deposition of James J. Morgan was played as follows:)
EXAMINATION
BY MR. ROSENBLATT:
Q. State your name, please, and your business address.
A. James J. Morgan, Philip Morris, Incorporated, 120 Park Avenue, New York, New York, 10017.
Q. What is your position, your present position with Philip Morris?
A. I am currently the president and chief executive officer of Philip Morris, Incorporated.
Q. And you've occupied that position since when?
A. Since December of 1994.
Q. What did you do to prepare for this deposition in terms of meetings?
A. I had several meetings for several hours each with the counsel, Mr. Hardy.
Q. Who else was present at those meetings?

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A. Mr. Heim was present at one of them, I believe, two of them, and intermittently, very intermittently some of our corporate counsel was there.

Q. Now, when you say several meetings, give me your best estimate as to how many.

A. Four.

Q. And several hours, each session lasted approximately how many hours?

A. Some of them lasted two hours, some of them lasted four hours. It's sort of an average of several hours.

Q. When was the most recent meeting?

A. Yesterday.

Q. How would you define marketing and what does it encompass?

A. I would define marketing as an integrated process which combines a successful marketing, a high quality product, packaged well, distributed thoroughly, which is presented to the public in a way that makes the product a product that or brand that they would choose to use.

That's also a very simplified explanation.

Q. Does advertising come within the overall umbrella of marketing?

A. Yes, it does.

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Q. You have been in the tobacco business for how many years?

A. I started with Philip Morris in June of 1963.

Q. And you never worked for a tobacco company before that?

A. No, that was two days after I graduated from college.

Q. Did they recruit you?

A. Yes.

Q. While you were in college?

A. Yes.

Q. A Frank Statement to Cigarette Smokers. What does that mean to you?

A. Nothing.

Q. A Frank Statement to Cigarette Smokers was an

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advertisement taken out in just about every major newspaper in the country at a point in time and was paid for by Philip Morris and other tobacco companies, and it had to do, generally speaking, with the subject of smoking and health.

Having told you that, does that ring any bells?

A. I have some memory, although I think it fairly significantly predates my joining the company. I believe it may be back in the '50s I've heard about

15759

an ad.

Q. From the time you got into the tobacco business, right up until today, have you ever read a Frank Statement to Cigarette Smokers?

A. No, I've not.

Q. You will get a chance to do so later today.

Veni vidi vici, do those words mean anything to you?

A. Yes, they do.

Q. What do they mean to you?

A. I believe they are on the crest, what I would call the Philip Morris crest, which is on a lot of our packaging.

Q. What do those words mean?

A. I do not know Latin, never took it. I believe it means: I came, I saw, I conquered.

Q. Why would those words be on Philip Morris packaging? Who did you conquer? Who did Philip Morris conquer?

A. I have absolutely no idea why they are on Philip Morris packaging. Philip Morris, the tobacconist, started this name Philip Morris, his name, 150 years ago this year when he opened a tobacco shop in London. I don't know whether he put on his first brand. I don't know where it comes from.

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Q. I was going to ask you, to your knowledge, when veni vidi vici first appeared on a product.

A. I have absolutely no idea.

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Q. So you don't know if it's been on for two years or for 30 years?
A. Or 150.
Q. Okay. And as you sit here today, the concept of I came, I saw, I conquered doesn't mean anything to you in the context of the tobacco business?
A. Not a thing.
Q. Would this, in your opinion, be a legitimate interpretation of those words?
To an outsider, obviously the dominant force in the tobacco business for the last 20 years approximately or so has been Marlboro. Marlboro is the absolute number one king of cigarettes, right, in terms of sales?
A. That's a fair statement.
Q. By the way, was there ever another brand of cigarettes that was number one as long as Marlboro has been number one?
A. I don't know the answer to that. Certainly, since 1963 and sort of understanding back maybe 10 years more in terms of industry sales and volume, Marlboro has been the number one brand longer than any

brand, I'd say, since 1950.
Q. Would it be a legitimate interpretation, I came, I saw, I conquered, to mean Marlboro, as a brand, has conquered the marketplace?
This is a new question. I'm simply suggesting to him, from your standpoint, does that seem like a legitimate interpretation?
A. No, it really don't, and my logic would go like this. You asked whether I knew it had been two years or 30 years. I should have answered it differently because I know it hasn't been two years that it's been on, and, in fact, I know it was on the pack when I joined the company in '63, because I know the Marlboro pack, at least I believe the Marlboro pack hasn't been changed since then.
So I would answer your question this way,

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which is, assuming that I'm correct that it was on the pack in 1963, I remember quite clearly that Marlboro was hardly the leading brand in 1963. It was a very small brand having only a fraction of the size that it has now. So I guess I'd answer you somewhat humorously and say, if that were the intent back when the brand had a two or three percent market share, someone was very bold putting that on and assuming that's what was meant.

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Q. Now, the warnings that you're required to put on your products which have been mandated by Congress, what does the warning say about cancer?

A. Well, the warning says about cancer that the Surgeon General has determined that cigarette smoking causes cancer and there's some other things.

Q. Okay. Is that Surgeon General's warning true and accurate or is it false?

A. That's a, to me, an interpretive statement. I believe it's neither true nor false, but it is a set of words that's subject to considerable debate and discussion.

Q. Well, do you think it's subject to considerable debate within the scientific and medical community?

A. No. I think the scientific and medical communities have fairly reasonably concluded in their minds that the statement would be fair. But, again, it depends on what you mean by the word "causes."

Q. Well, I mean cause has a common sense connotation, doesn't it?

A. Well, I'm not sure it has a common sense connotation as much as it's a complex connotation. I think there are different levels of cause.

Q. So if you are asked a direct question putting

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aside, for the moment, the Surgeon General's

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warning,
and you are just asked straight out, as the president and CEO of Philip Morris Inc., does Marlboro or Virginia Slims or Benson & Hedges cause cancer, what's your answer to that?

A. My answer to that would be that cigarette brands, cigarette smoking may possibly cause cancer.

Q. And therefore, logically extended, if cigarette smoking may cause cancer, then obviously you are selling a product which may cause cancer?

A. That is correct.

Q. What is your knowledge of the research, and I'm not asking you this from a technical detailed standpoint, but I'm asking you a more general kind of question as to what is your understanding of the progress of scientific research when it may be anticipated that there will be an answer that will satisfy you one way or the other, either cigarette smoking does or it doesn't cause cancer and other diseases?

A. My understanding of sort of the flow of scientific research is that the issue continues to be fairly clear that there is statistical associates between cigarette smoking and cancer, epidemiological studies, but in spite of the really immense resources

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that have been put against this subject by a variety of different groups, there still is no process that has been documented and validated that goes from what I would call a lit cigarette to lung cancer. And that process has escaped the best of scientific investigation and thinking.

And that's why I think that a more accurate characterization and a fair characterization is that cigarette smoking may cause lung cancer.

Q. But, you know, based on that answer, and since obviously it's not the kind of situation where someone, on a given day, smokes a pack of cigarettes and the next day develops lung cancer, you accept that basically all the research talks about a gap in time,

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smoking for a given period of time, and then a disease comes a certain number of years later?

A. I'm not sufficiently technically or scientifically knowledgeable to state that as a fact, but from just my general readings I don't think I disagree with what you're saying.

Q. So can you see in a practical sense, having described the process as you understand it, ever being at a point in time where one can -- where you could definitively say, well, here's the proof, it does cause cancer or it doesn't cause cancer, or is it your

feeling, based on your reading and from whatever other source, that it's really going to always be pretty much of an unknowable on the issue of pure causation?

A. I do not believe it would be an unknowable.

Q. Well, what do you see? Can you conceive of an experiment or research that will satisfy you that it's no longer an unknowable?

A. You're asking the wrong person if you are looking for definitions of experiments. But I approach it on a common sense basis, which is, there are many, many, many things that we all live with and deal with in our lives as human beings, where at one point in time it was not clearly understood the process by which things happen. And not just in the scientific or medical area, just life I think is like that.

But one of marvels of our society and our culture and history is that we tend to find the answers to those because we tend to focus on them. And generally specking, I think it's a fair characterization of the modern world to say we find more answers than we don't.

So I have no reason to believe that the issues and the controversy regarding cigarette smoking and its role in disease won't be found and documented and where everybody can understand the steps along the

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way. It's just today it is an unproven fact. And it's very hard to make conclusive and sort of authoritative dogmatic statements about this until you know the mechanism and the process by which these things happen.

Q. Well, the Surgeon Generals and the public health organizations and the American Cancer Society and the American Heart Association and the American Lung Association has apparently not had any difficulty making the association, wouldn't you agree?

A. They have not had any difficulty making the statistical association and calling that cause. Those groups, which spend hundreds of millions of dollars a year in research in these areas and are truly dedicated to finding these answers, have not found the answer yet. They have not found the process by which one can take a lit cigarette and track it to disease in a human being, nor have they been able to determine why a lit cigarette for some people never contracts to a disease in some other people. It is still, from that viewpoint, it is still a very open subject.

Q. But you will agree that from the standpoint of the organizations I just mentioned and the literature and the articles which appear in journals such as the New England Journal of Medicine, these articles generally start out with the proposition, and

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it's accepted by the public health community and all these organizations and the United States Department of Health and Human Services, that cigarette smoking does, in fact, cause lung cancer and other diseases?

A. That is what they say.

Q. That is what they say and that's what they believe. You don't agree with them, but that's

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what
they say and that's what they believe?
A. No, I don't know what they believe. I know what they say, but I don't know what they believe about the word "cause." And they are, in many cases, many of these people are very reputable people, but they do not define the word "cause," to the best of my knowledge. It's left as an open word. Nor do they document the process by which it is causes, because nobody knows that.
Q. Are you a smoker?
A. Yes, I am.
Q. How heavy?
A. Three packs a week.
Q. Three packs a week?
A. Uh-huh.
Q. When did you start smoking?
A. That's -- the word smoking is a difficult word to deal with. I can tell you when I had my first

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cigarette and then I can tell you, at least in my words, when I started smoking.
Q. Tell me when you had your first cigarette?
A. My first cigarette I remember vividly. I was nine years old. I lived in Rapid City, South Dakota. My father was in the Korean War, in the Air Force, and I suppose, like most nine year olds whose father was in the Army or the Air Force, my pal, Bob Shelton, and I were playing GI Joe back up in the cow pastures behind our house, and we had our helmets on, and we had out BB guns, and we had our canteen, and we went and lay in a ditch waiting for the North Koreans to come over the hill.
And we were talking about that and I said, boy, you know, we're really ready for them. And he said, yeah, but we don't have our cigarettes. And I said, oh. He said, I'm going to go get some. And he

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went back to his house and I think he snipped two Pall Malls from his mother and brought them back up. And I remember lying there with my helmet on smoking my first cigarette, terrified that I was going to get sick from it.

Q. So is it fair to say that in the context of that story, that you associated at 9 years of age -- your buddy was also 9?

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A. Yeah, 9 or 10.

Q. Give or take?

A. Yes.

Q. Both of you associated the cigarette with macho, with being a man and being a tough man and ready to take on the North Koreans and kick some butt?

A. Well, all the soldier and Air Force people I knew smoked.

Q. Okay. And you associated --

A. And my parents smoked.

Q. Did you get sick?

A. No, I didn't get sick, thankfully.

Q. And probably your second cigarette is not as vivid?

A. I don't remember smoking again, really. I went to a private school that had no radios, no smoking, no nothing. And I remember every once in a while on holidays, the days off that they give you, going downtown with a group of guys add age 16 or 17 probably having a cigarette.

I would say I started smoking when I got to college and --

Q. On a regular everyday basis?

A. Yes. So that's how I'm defining smoking. Let me put it this way, where I would buy cigarettes,

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okay?

And there were four of us as roommates, and all four people smoked. And I would say that's where I

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really started smoking.
Q. Okay. So from that time when you became a regular steady smoker in college as a college freshman?
A. Yes.
Q. Up until today, has there ever been a time during that time frame when you quit for a period of time exceeding a week?
A. Yes.
Q. Tell us about that, the first time you attempted to quit.
A. The first time that I attempted to quit and did quit would have been -- I'm going to have to be somewhat general -- I'm going to say late 1970s.
Q. Okay.
A. Okay. I don't remember the specific year.
Q. Okay.
A. And the reason I decided to quit was really an intellectual reason. And it had to do with my job. And at that point there was a lot of discussion in the media and sort of just generally -- excuse me. This wire keeps tripping me.
There was a lot of discussion in the media

and sort of the folklore that cigarettes were hard to quit. And I would hear stories about people who just -- I had friends who said they would stop smoking and they just stopped like that. And there were clearly other people who had more difficult times than that.
And I decided to quit for the principle of seeing if I could quit. There was no other issue than sort of a professional desire to say, for myself, I'd just like to see if this is really as hard as people say or as easy as people say. And I stopped. And I stopped -- again, don't hold me to the specific time -- but I stopped for about five or six months, I'm going to say.
And interestingly, my wife kept smoking

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at
16 that time. And we flip-flopped on this, which, as
I
17 tell you my history, you'll get into it. My wife
kept
18 smoking. I didn't find it difficult at all to
quit.
19 I did not miss it. I did do one thing,
which
20 aided me personally, which is, I carried a straw
with
21 me, because I wanted again to understand what this
was
22 about. And I found myself from time to time, when
I
23 felt like it was a moment that I'd enjoy a
cigarette,
24 I'd hold the straw. And that helped my hands at
that
25 time.

15772
1 I started up again because I didn't quit
2 other than to find out what it was like, and sort
of
3 with the same degree of intellectual approach, I
said,
4 I want to feel like experience quitting. I
started up
5 because I enjoyed cigarettes and I wanted to start
6 smoking again.
7 Q. Before I start asking you some questions
8 about starting up, let's talk about this. Let me
ask
9 you a few questions about this time of
approximately
10 five to six months when you quit.
11 A. Uh-huh.
12 Q. Now, in terms of your description,
obviously
13 you would have proven your point by quitting for a
14 week. In other words, you smoked for a certain --
for
15 a number of years. You've told me you wanted to
test
16 this theory: Is it hard to quit; is it not hard
to
17 quit. And you quit.
18 And so what I'm saying to you is, why
was it
19 necessary to quit for five or six months when
obviously
20 you proved to yourself the point after one week?
21 A. I do not think that you prove the point
after
22 one week. I continued to smell cigarette smoke,
to see
23 people smoking, and I must say, after one week, I
24 continued to find cigarette smoking an appealing
thing.
25 So I wanted to go until I, again, on an

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intellectual

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basis, just decided that I had satisfied myself as to my own personal feels about what the subject of quitting was all about. And then I decided to resume smoking.

Q. Now, in the late '70s you were employed by Philip Morris?

A. Yes, I was. I was executive vice-president of marketing and sales.

Q. What brand or brands had you smoked from the time you began as a freshman in college up until the late '70s?

A. Wow.

Q. A lot of different brands?

A. Take a break for a minute?

Q. No.

A. I believe I smoked Pall Mall and Lucky Strike when I was in college. And when I went to work for Philip Morris, I started smoking Marlboro. And I would say that Marlboro was my regular brand, although of course being in the business, I would try all our brands. And particularly I'd say in the late 1970s, I might have actually for a while switched to Merit because I was deeply involved in the introduction of that brand. So I probably was sort of mixing between Marlboro and Merit at the late 1970s. Today I smoke

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Marlboro Lights.

Q. How heavy of a smoker were you when you quit in the late '70s?

A. Pack a day.

Q. During your smoking career, what is the most smoke -- I mean, were you ever a two-pack-a-day smoker?

A. I don't think so, no.

Q. Was there a period of time, pack and a half? Or has it --

A. As a regular pattern?

Q. Right.

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A. No.
Q. So from college up until today, when you have been smoking it's generally about a pack a day?
A. Yes, but that's not to say that there wouldn't have been days --
Q. More or less?
A. Yes.
Q. Sure. I understand.
A. If we're going to characterize it, I'd say pack-a-day smoker is a fair characterization.
Q. Okay. So then after this period of about five or six months, where you did not smoke a single cigarette, and I know five or six months is approximate, you went back to smoking.

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A. Yes, I did.
Q. The same brand that you had been smoking before you quit or a different brand?
A. I don't remember.
Q. Okay. And then you became a one pack a day approximately smoker again?
A. Uh-huh.
Q. Did you ever quit again?
A. Yes, I did.
Q. Okay, when?
A. In 1983, in the Summer of '83, I actually left Philip Morris for another job.
Q. Okay. Let's go back to your smoking history.
You quit again in 1983.
A. Uh-huh.
Q. Why did you quit at that time, quit smoking?
A. Basically I was in California. My wife was in New York. Our oldest -- our youngest daughter was a senior in high school at that point. So that we decided to keep her there. And I was sort of in California, new job, new location, and I just decided to stop again. No specific reason other than saying, I've been smoking a long time and I'm just going to stop. No compelling desire, just sort of different surroundings, and I thought I'd do it again.

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Q. Well, did this thought occur to you, either

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at that time or any other time, since I proved to myself that I can quit smoking without any difficulty, since there's a lot of stuff in the newspapers and a lot of doctors and a lot of scientists and the Surgeon General, obviously say that cigarette smoking causes cancer and other diseases, you know, why smoke?

A. Not really.

Q. And how long did you quit at that time?

A. Oh, boy. Two to three months.

Q. And do you remember the circumstance causing you to decide to become a smoker again?

A. No, not really. Just decided, I enjoyed it.

Q. Now, you say in '83 you were in California and you had a new job.

A. Uh-huh.

Q. What job was that?

A. That was the Atari job.

Q. Where in California?

A. Atari was in Sunnyvale, California.

Q. And you started smoking again after two or three months, and did you ever quit again?

A. Yes, I did.

Q. When?

A. 1987, I think it was. In the Spring of 1987.

Q. And why was that?

A. I had a collapsed lung at that point. I think it's called spontaneous pneumothorax, if I remember. Characteristic of tall thin, males, usually younger than I at the time. And I stopped smoking after that.

Q. Did your doctor tell you he thought it would be a good idea to stop smoking?

A. At that time, yes.

Q. And you agreed with him?

A. I didn't agree or disagree.

Q. You just stopped?

A. Common sense.

Q. And how long did you remain a nonsmoker?

A. Eight or nine months.

Q. So that was the longest time that you were off cigarettes?

A. Yes. I'd say so.

Q. So what caused your collapsed lung?

A. I'm not a doctor. I'll tell you in layman's language what I was told, which is that it was a --

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what's that called when you're born with something?
Q. Congenital?
A. Yes, thank you. That a lot of tall, thin males have a congenital thing where they have a weak

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spot and at some point their lung collapses.
Q. So what was your understanding of why you should stop smoking?
A. My understanding was that I didn't want to at that point because something had happened to one of my lungs.
Q. And obviously when you inhale cigarettes, smoke goes into your lungs?
A. I think that's correct.
Q. So you quit for eight or nine months.
A. Yes.
Q. Do you remember the circumstance where you started again?
A. Not specifically as an event, but generally I remember that I'd have a cigarette on like Saturday nights after dinner. And I'd start smoking a cigarette or two in a social occasion.
Q. And then within a period of time you went back to your approximately pack-a-day habit?
A. Or a little less.
Q. Ever quit again?
A. Yeah, in intermittent places. A lot of times, if I go on vacation for two weeks, I don't smoke. There will be weekends that I don't smoke. There will be days that I don't smoke. But I assume

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your question is a prolonged period of time.
Q. Yes. Couple of months or more?
A. No.
Q. '87 was the last time you quit for a prolonged period of time?
A. I think that's correct.
Q. How did you go about marketing the concept of tar, lower tar in cigarettes?
A. Could we sort of step that question?
Q. Yes, the background, to me as a layman and looking generally at the advertisements, a selling

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point for some brands of cigarettes appears to be my brand of cigarettes is lower in tar than the other guy's, and therefore, you should buy my brand.

In other words, somehow low tar should be attractive to a consumer?

A. Okay. When I joined the company in '63, I would describe that, if we have a discussion here about sort of a historical perspective on the U.S. cigarette industry. And when I joined in '63, tar was, to some degree already an issue in the world of cigarettes.

As early, I think it was 1953, what's now called the famous Readers' Digest article, the Readers' Digest ran a significant article that at that point I think the brand was Kent, identified Kent as a brand

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which had a filter that filtered out tar differently or more effectively than other brands. And Kent really sky-rocketed as a brand at that point. I don't remember the numbers, but, I mean, it went from a very small brand to a significant brand.

During the '50s, there were also all the filtered brands introduced, and so by the early '60s, when I got there, tar was already in the vocabulary. And I would characterize my first 15 plus years of cigarette marketing as being very focused on tar, because the consumers in this country were demonstrating that they would like to try lower tar cigarettes.

So there were several things that were happening. One was the tar level of existing brands was being reduced. There were line extensions introduced, usually called lights, which were lower tar versions of the parent, and also during that period of time there were ultra low-tar cigarettes introduced, all in response to consumers' obvious desire to try lower tar brands. The story goes on from there.

Q. Why do you think that consumers were expressing a reference for low tar?

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Wouldn't you agree that the reason for that preference was that in the consumer's mind, at least,

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somehow low-tar cigarettes were less hazardous to their health than high-tar cigarettes?

A. I believe that the consumer was motivated by that.

Q. And, therefore, you, as a marketer, as a businessman, obviously had an incentive to satisfy that preference?

A. We did introduce a number of lower tar brands during that period of time.

Q. Did you believe then or do you believe now that lower-tar cigarettes are, in fact, less hazardous to the smoker's health than cigarettes that are higher in tar?

A. I don't believe that to be the case. I don't have enough knowledge to state that, and therefore, I have no basis to believe it.

Q. Isn't that true?

A. What?

Q. That from your standpoint, the difference between a low-tar cigarette and a high-tar cigarette is meaningless from a health standpoint, as far as you know. Isn't that true?

A. It could be true.

Q. But you just don't know?

A. I don't know.

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Q. Just like it could be true that cigarette smoking causes cancer, you just don't know? It could be true, but you don't know?

A. It's possible.

Q. What Philip Morris brand today is highest in tar?

A. I'm going to guess at this, because I don't know it exactly. My guess would be it would probably be something like English Ovals nonfiltered.

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Q. And what's the lowest brand in tar?
A. Merit Ultima.
Q. Now, Merit Ultima, how many milligrams of tar?
A. One.
Q. And the mainstream Marlboro brands for example, how many milligrams. I know there are a lot of different ones?
A. I don't mean to be tricky with you, but give me which pack you think is the mainstream.
Q. You tell me the best seller.
A. The best seller is Marlboro Lights, and that's 11.
Q. So what's the highest Marlboro?
A. 16.
Q. Which one is that?

A. The Red. Let me correct that because Marlboro 100s full flavor may be 17 or may be 16. It's either Marlboro 100s or Marlboro Red.
Q. What do you attribute Marlboro's incredible success to? Is it the cowboy motif or what?
A. I attribute Marlboro's success, which luckily and fortunately I've been able to be a part of for so many years, I attribute its success to a variety of things.
Earlier on we were talking about marketing, and I think I used the word "integration." I think Marlboro integrates its product and total proposition extremely well. I think the product itself is a superior product.
Secondly, I think its packaging is excellent. I believe its advertising is excellent. I believe its sales promotion programs are excellent. The quality and consistency with which the product comes, we spend a lot of time and a lot of money making sure that things like the tear tape on the cellophane are always in the right position and not defective. We really try and make that brand the highest quality brand that we can make.
I think it's the fact that all those things

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have been done for so well, for so long so

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consistently. Marlboro has not changed in basically 35 years. Its package is the same. Its advertising is the same. Its product is largely the same. It is Marlboro, it is reliable, it is consistent, and the consumers have a great sense of security and comfort and understanding that the Marlboro you get today is the Marlboro.

Q. So that if someone smoked Marlboros 25 or 30 years ago and was in a Rip Van Winkle situation where they were asleep for 25 years, and then today bought a package of Marlboro, it would essentially be the same tobacco product as it was 25, 30 years ago?

A. Yes. I think its tar has been reduced gradually over that period of time, but it would essentially be the same Marlboro.

Q. As the president and CEO of Philip Morris Inc. you would agree that your paramount responsibility is to your stockholders, correct?

A. Paramount, but not only.

Q. Your second responsibility, in terms of a listing, would be to your customers, to your smokers, the people that smoke your product?

A. Probably by some small edge over other responsibilities.

Q. Okay. Now, you mentioned that last year the

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sale of cigarettes in the United States of America actually increased?

A. The reported data was up four-tenths of a percentage point.

Q. Okay. You would agree that the great majority of new smokers are the young?

A. No, I wouldn't agree to that.

Q. Do you think a lot of people are starting to smoke when they're 30?

A. What do you mean by young?

Q. Under 18?

A. I don't know that as a fact.

Q. What do you know as a fact? In other

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words,
we know that certain number of smokers die. We know a certain number of smokers quit smoking and the replacement smokers, would you not agree that, generally speaking, the replacement smokers, the new smokers come from amongst the young?
A. No, I really wouldn't agree with that. I believe that it's factually correct that the largest increase in incident of smoking last year came among 35- to 44-year-old people.
Q. You have data which tells you that there are a large number of 35-year-olds, in that range, that start to smoke for the first time?

15786
A. No, that's not what I said. I said that the incidence of smoking among the 35- to 44-year-old age group increased. It does not mean they started smoking.
Q. So, in other words, it could be that the people in that group used to smoke a half a pack a day, and now they're smoking a half a pack a day?
A. No, that's not true. Whether you smoke one cigarette, two or three or two packs, that would be counted as incidents.
Q. Is cigarette smoking addictive?
A. I need to answer that question with more than a yes or no answer. Unfortunately, some of my colleagues got put into a position where it was demanded they answer that yes or no. And I don't think that's a question that can be answered yes or no.
Q. You're referring to the Congressional hearings?
A. Yes, sir.
Q. And they all said no?
A. That's what they said.
Q. And after you get done with your explanation you're going to say no. Certainly you're entitled to give your explanation.
A. Is that what you'd like.

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Q. Isn't it true, Mr. Morgan, that when you

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get
done with your explanation, and I'm going to certainly
allow you to give your explanation because addiction is
apparently a complicated subject to you, at the end of
your explanation, aren't you going to tell me, and you
seem like a very direct guy who's going to avoid a
direct question, and the direct question is: Is
cigarette smoking addictive? And I have the feeling
that when you get done with your explanation you're
going to say, no, it's not. Isn't that true?
A. Why don't you let me answer and then you can
draw the conclusion?
Q. Fine.
A. The subject of cigarette addiction is,
nicotine addiction or cigarette addiction is obviously
all over the news and on people's minds. Just last
night on CNN there was a show where some people were
talking about it.
And my view of addiction, cigarette
addiction, is this: If you want to place addiction as
a word, a definitional word, a semantic word, if you
mean by addiction pharmacologically addictive, my
answer is no, it's not.
And the reason that I say no, it's not, is
that pharmacological addiction, as I understand it,

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depends on three things, none of which, neither of
which, not one of the three of which cigarettes really
hold up to in the real world.
The first one, again, as I understand it, is
intoxication. And clearly to me, as a smoker, and in
the business, and knowing other people who smoke,
cigarette smoking is not intoxicating. You don't smoke
a cigarette and all of a sudden become incoherent; you
don't become babbly; you don't get into a car and drive
it crazily into a telephone poll. Cigarette smoking
does not lead to intoxication.
So, the first of the three legs of the
pharmacologic definition of addiction just doesn't

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hold
14 up.
15 The second leg of the definition involves, I
16 forget the word, but what I call it is ever-increasing
17 dosage, and that's classic of hard drugs.
18 In the case of cigarettes, if you look at
19 smokers, smokers do not increase the dosage of
20 cigarettes. In fact, just the opposite. As people
21 smoke for longer periods of time and as they age, the
22 history of this industry is they go down the tar
23 spectrum in brand selection.
24 I started with Pall Mall, went to Marlboro.
25 and I'm now on Marlboro Lights. And I smoke Merit

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1 Ultra Lights from time to time. But the sales of this
2 industry indicate that people go down the tar spectrum,
3 not up.
4 Furthermore, as people get older, they smoke
5 fewer cigarettes per day on average. So that the whole
6 dosage theory just doesn't hold up, because in the real
7 world people don't increase their amount of smoking.
8 The last leg of the three-legged stool of
9 pharmacological addiction is that you need to have
10 significant and singular withdrawal symptoms, and I
11 also don't believe that's true with cigarettes. I
12 believe it from my own experience, I believe it from
13 watching my wife, and I believe it from having friends.
14 One friend as late as Saturday night said: When I
15 stopped, I just stopped. There was no big deal. I
16 made up my mind I was going to stop and I stopped.
17 So, I think most people would tell you that
18 while cigarettes may be difficult to give up, there are
19 not severe withdrawal symptoms. So pharmacologically,
20 my answer is no.
21 If you want to now shift the discussion from
22 a pharmacological definition over to what I'll call,
23 for myself, a behavioral definition of addiction, then

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I am willing to not say no. I am willing to say in my judgment, from my own experience, that cigarettes may

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be behaviorally addictive, if you use the behavior word in terms of the following characteristics: Cigarettes are pleasurable, no question about it. To a smoker, cigarettes are pleasurable. Cigarettes become part of your day-to-day life; no question about that. You use them as something in your hand; you use them because you like the warmth of the smoke; they are part of your behavior.

I'm not at all embarrassed, afraid or intimidated to say that I believe that cigarettes become part of your lifestyle, and therefore, may be behaviorally addictive. The level of addiction, in that case, since I'm talking about behavior, to me relates mostly to someone's mind, how they think, what they need, and how they lead their lives.

And in that sense, that's where I believe that cigarettes are. If they are behaviorally addictive or habit-forming, they're much more like caffeine, or in my case, gummy bears. I love gummy bears, and I just love them. I want gummy bears. I like gummy bears and I eat gummy bears, and I don't like it when I don't eat my gummy bears. But I'm certainly not addicted to them.

Q. They don't have nicotine in them?

A. They have sugar.

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So, I'm sorry for the long-winded answer.

Q. I am, too, but I wanted to show you the courtesy?

A. Thank you.

Q. Letting you finish the three-legged stool.

A. Thank you. You can decide your bet was right, that I said no.

Q. Now, behaviorally addictive, as you've used the term, does that also mean psychologically

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addictive?
A. We're going to start traipsing into areas with words where I'm not sure, I know the full meaning of. I said I was defining behaviorally myself. Yeah, I believe that as I would use the word psychologically, I believe it could be psychologically habit-forming, yes.
Q. Do you believe there is a category of people, a category of smokers, who have decided that they, based on the scientific and medical evidence that's out there, and based on their reading, they have decided that smoking is bad for them and they want to quit?
And let me finish.
They've made a decision they want to quit smoking. They're started to have some symptoms. They don't feel good. They think it's -- they wish they

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didn't smoke, and they've made a decision to quit. They tried to quit and they can't.
Will you admit that there are a certain number of people, smokers, who fall in that category?
A. No.
Q. Okay.
A. I believe that they haven't quit. But I don't believe that they can't quit.
Q. So basically, any smoker who tells you that, that, you know, I've tried, I've just tried, but I can't do it, is what, just a psychologically-weak person?
A. I don't know how to characterize them. There are 50 million people in this country who can find that they have quit largely on their own, predominantly on their own. Giving up cigarettes is not something that is an impossible task.
And, in fact, the numbers suggest there are more people in this country today who are ex-smokers than who currently smoke. So "can't" is just an absolute word that I won't buy off on.
They've chosen not to. Whatever the apparatus is that you want to talk about, they

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have
been unwilling or unable to come to the point in their
minds where they just say: I'm not going to smoke

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anymore. But there are 50 million people who have done
that.
Q. What conclusion have you reached about why
these 50 million people have quit smoking, people that
smoked and then decided not to smoke?
A. Well, my first conclusion is that, in fact,
that I'm proud of this country and I'm proud that in
this country that we still hold to the principle of
informed, free adult choice.
And the fact that 50 million people who, at
one time smoked and decided not to smoke, is a great
testimony to several things:
First of all, the knowledge of the
possibility that cigarettes may cause disease;
secondly, the fact that we're still composed of a group
of people in this country who have the ability to think
through these issues and come to their own conclusions.
I think it's a great testimony to our
society, and frankly, I think it's a testimony to my
company and my industry, that we are a company that
continues to provide people cigarettes who want to
smoke and we don't provide or market to people
cigarettes to people who don't want to smoke. I'm
proud of that.
Q. Have you ever in your entire life known a

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smoker who at least said to you they wanted to quit and
told you they could not quit?
A. No. I do not know of anybody who has ever
told me that.
Q. My question to you is: Well, if you're not
informed, how can the average Joe on the street be
informed about the health consequences when they hear
you say maybe it does cause cancer, maybe it

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doesn't?
A. I do not believe that what I said was literally it may or may not. I don't know. I said I believe that it is possible that cigarettes cause lung cancer. "I believe," is what I said.
In terms of the public being informed, I think any reasonable person, any reasonable person would agree that there are three common beliefs by the public about cigarettes, common beliefs, independent of whether they are correct or not correct, independent of whether they are substantiated with fact or not.
There are three common beliefs that are widely held about cigarettes in this country. Number one is that cigarettes cause cancer. People believe that. Secondly, that cigarettes --
Q. You don't, but people do?
A. I said I believe they possibly can cause disease.

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That cigarettes are addictive. I believe people believe that. I explained how I feel about that.
And the third one is that I believe that everybody thinks that secondhand smoke is potentially harmful to their health. I'm not sure that a majority of the people actually believe that secondhand smoke will affect them or hurt them or cause it, but I think that they are aware that there's a very large issue there.
So, when you talk about informed, I must say that I believe that the public is very informed on these issues. They may not be accurately informed. They may not understand the nuances and some of the issues and some of the debates, but the public's belief in my judgment is now and has been for a large number of years well ahead of the reality and knowledge base in the communities that ultimately decide these things.
Q. What was Marlboro Friday, and how did it come about?

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A. Ready for another Atari story?
Q. Sure.
A. Marlboro --
Q. Shorter, I hope.
A. Okay. Just tell me when to speed it up or

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shut it down.
Q. Then your lawyers give me a hard time if I tell you.
MR. HEIM: We will say shorter, too, Stanley.
A. Marlboro Friday was or is the name that has been given to a day in April of 1993. I think April 3rd. I don't actually remember, but I think it was April 3rd.
And it was a day where Philip Morris announced on Marlboro we were going to start a national price promotion, taking the price of Marlboro down 20 cents a back at all retail stores.
Q. And you did it?
A. We did it.
Q. So where is the rest of the Atari story?
A. Okay. Here we go. Leading into Marlboro Friday -- and let me say carefully upfront, a lot of the story I'm going to tell you happens during the ten years I was not in the Philip Morris cigarette business. I left in '83, came back in '88, so I wasn't with Philip Morris from '83 to '88.
And when I came back in '88, basically for the next five years, until I came back to the Philip Morris domestic cigarette business, I worked in corporate. So a lot of what I'm telling you is more as

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a student and observer, and not firsthand experience.
Starting in the mid-1980s, a part of the cigarette industry started to grow which is what's called the discount category, cigarettes of lower quality and lower price, and during the mid and late '80s, the cigarette industry witnessed a fairly sharp run up in the growth of the discount category.

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And
Philip Morris participated in that. It had a variety
of discount brands.
In the early '90s, all of a sudden Marlboro
started to lose sales to the discount brands. The
discount brands demographically tended to be older,
female smokers, for whatever reason.
And Marlboro, which has a profile more male
than female, and more 25 to 35 and older, sort of held
on for a long time in the face of this growth of the
discount category.
And in the early '90s, Marlboro started to
feel the impact of the discount category, which, at
that point, was starting to represent, don't hold me to
it, I'm going to say about 25 percent of the industry.
Q. The discount brands?
A. The discount brands, of which we had some,
and we were aggressively participating in that
category.

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In the period leading up to Marlboro Friday,
for a rather extended period of time we sort of did a
strategic re-evaluation of, geez, do we really want to
be in the discount business. I mean, there is no brand
loyalty in discount cigarettes, and people are buying
them strictly because of price, and the data
demonstrated that very clearly that if this pack were a
dollar thirty-nine today, I would buy it, and if some
other brand were a dollar thirty-one tomorrow, I would
buy that. And people were zigging and zagging just
around brands, and it really was, for me -- even though
I wasn't in the business, I saw it happening -- it was
really a threat to one of my core beliefs about
cigarette brands, which this is a business about
consistency.
And when you get people starting to zig and
zag on brands, and you break the loyalty to a

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brand,
there is real trouble ahead.
So there was a lot of discussion about what to do about the growth of the discount brands. And by the Spring of 1993, right ahead of Marlboro Friday, the discount category had actually reached 39 percent of the U.S. industry.
As I said, discount brands are lower quality, they are lower priced, and therefore, they are less

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profitable. Discount brands are significantly less profitable than what I call premium or full-margin brands.
So we decided on April 3rd, Marlboro Friday, the Spring of '93, we decided to lower the price of Marlboro to stop Marlboro's vulnerability to discount brand.
We did it. We executed that promotional program for about four months into August. Then we lowered the list price of Marlboro by 20 cents a pack to make it a permanent and basically a national, if you will.
We also, at that time, lowered the price of our other premium brands the same amount we lowered Marlboro. From the period April to August, if that's the time frame, our other premium brands actually were still at the higher price, and then they were getting really hurt, because not only were the discount lower brands lower priced, but now Marlboro was lower priced. So we lowered them in August. So that's sort of the Marlboro Friday scenario.
Q. So, in August of 1993, all your premium brands were reduced by 20 cents per pack?
A. Yes. July or August. I forget. A couple of months time frame.

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Q. Has that remained in place to this day?
A. Well, that price decrease remained in effect to this day, but there have been several price increases since then. So it's chicken/egg. I mean, we didn't change our minds about lowering the price on Marlboro Friday, but we have, because of costs and inflation, come back and raised the price several times since then.
Q. Historically, with respect to premium brands, Philip Morris generally raises the price, what, twice a year?
A. You'd have to talk about the time frame because there is no continuing pattern on that. If you gave me a time frame, I could answer that.
Q. 1980 to now.
A. From 1983 or '4, until 1993, roughly ten-year period, Philip Morris raised its prices two to three times a year. Since 1993, we've raised prices less than once a year.
Q. Why?
A. Because there is, in a business sense, there is an elasticity related to price. And we believe that we don't want to price our cigarettes ahead of inflation.
Q. When, during the approximately ten-year time

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frame that you were raising the prices two or three times a year, what was each raise, how many cents?
A. Gee, again, I wasn't there, but if inflation, during that period of time, were X, I would say that the price increases were two, two and a half times X annualized in aggregate.
Q. Let's talk about the point you made about discount brands, the lack of loyalty, price being the whole ball game to the consumer, correct?
A. Uh-huh. Not the whole ball game, but a certainly more significant ball game than with premium brands.
Q. Okay. With premium brands, the history

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of
the tobacco industry has been some brand loyalty?
A. Yes.
Q. Okay. And that was very important and highly
cultivated? I mean, that's a big positive brand
loyalty?
A. From a business standpoint, that's a huge
positive. I believe that cigarettes rank in one of the
top three categories for people being loyal to the
brand that they choose to use.
Q. Would you not agree that when you look at the
discount market, that what it says to an outside
observer is that if the price is right, it doesn't

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matter what I'm smoking, as long as I get that hit of
nicotine?
A. No. I don't agree with that at all.
Q. Well, what do you make of it? I mean, people
are just -- they'll buy this today if it's a nickel
cheaper and they'll buy that tomorrow if it's a nickel
cheaper?
A. But the end of the story is that in 1993, on
Marlboro Friday, when we lowered the price, we lowered
the price. Marlboro had a 21 percent share of industry
and was losing share at the rate of over 2 share points
a year. That was the annualized rate.
We lowered the price 20 cents; we didn't
lower it down to the discount brands. That's an
important point. We did not say we're going to price
Marlboro the same as discount brands.
What we did was, we said the gap between
Marlboro and the discount brands is too large. We want
to narrow the gap, and we narrowed the gap to a 40
percent gap, where Marlboro was 40 percent more
expensive than discount brands. So we didn't match it.
We just narrowed the gap.
And from that day on, Marlboro has grown to
today and has grown, as I said earlier, from a 21
share, and declining in 1993, to a 33.5 share today.

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Q. And do you attribute all of that or most of that to the price reduction?
A. The shift in that momentum I attribute to the price reduction, and closing the gap, and making the value of Marlboro that consumers see in Marlboro through its product, its packaging, its consistency of its marketing, its taste. All of the components of this integrated Marlboro I talked about were now put back in line with the consumers' value perception, not unlike why some people will buy a Chevrolet and other people will buy a Jeep and other people will spend more than that on another car. It's all about the perception of value in the brand that I choose relative to the cost that I'm going -- the money that I'm going to spend to get it.
Q. What is the Center for Indoor Air Research?
A. Center for Indoor Air Research I believe is an organization -- no, I'm sorry. Center for Indoor Air Research.
Center for Indoor Air Research is an organization that studies the quality of air in enclosed environments.
Q. What has been your dealings with that outfit, if any?
A. Well, actually, about a year ago, I was put

on the board of that organization. I've been to one meeting, and I'm aware that they study, I think, both initiate studies, but also I am aware that they study other studies that are being done around the world on indoor air research -- indoor air quality. I'm sorry.
Q. What is or what was the tobacco industry research committee?
A. That I'm not aware of.
Q. Now, you also had a series of public service ads on the accommodation program?
A. Yes.
Q. Now, Reynolds also had a series of ads

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where
they used the word accommodation. I don't know if you're familiar with them?
A. I'm familiar that Reynolds ran advertising.
I don't remember that they used accommodations.
Q. They did. I took the deposition on Monday of the CEO of Reynolds, and we went through some of the ads, and without question that word appears.
Now, in looking at the Philip Morris ads and the R.J. Reynolds ads, although different but they still use the word "accommodation," that's the way to resolve these problems as opposed to having government attempt to resolve these problems. Was that a campaign that was worked on together between Philip Morris and

15805
R.J. Reynolds, or did each company work totally independent of the other?
A. I think the -- at Philip Morris, the accommodation effort started before I returned to domestic tobacco, but I would feel very comfortable in saying that those were developed independently of each other.
Q. A document, William L. Dunn, Junior, Philip Morris Research Center, Richmond, Virginia: Motives and Incentives in Cigarette Smoking. I'd like to have that marked as Plaintiffs' Exhibit 11.
So you now have Plaintiffs' Exhibit 11 in front of you. William L. Dunn, Junior, who is he?
A. Bill Dunn. Is there a date on this memo?
Q. They're talking about a conference that occurred, referred to as the St. Martin conference in January of 1972. I think that's --
A. Okay. That's fair enough. The Bill Dunn here would be Bill Dunn who worked at Philip Morris R&D in Richmond, research and development.
Q. Look at Page 4, about one-third down from the top, number one. The statement is made: No one has ever become a cigarette smoker by smoking cigarettes without nicotine. Would you agree with that?

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25 A. Could I take a minute and just acquaint

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myself with this document?
Q. Absolutely.
Look at Page 5.
A. I'm starting to scan it, so I get a feel for what this is all about.
Q. Sure.
A. Okay.
Q. Look at Page 5.
A. All right.
Q. The beginning of the second paragraph, is it Mr. Dunn or Dr. Dunn?
A. I do not know.
Q. Quoting him: The cigarette should be conceived, not as a product, but as a package. The product is nicotine.
And then go down several lines where he says: Think of the cigarette pack as a storage container for a day's supply of nicotine.
Now, if you just look at that language, what I've read, would you not agree that Dunn seems to be talking about nicotine as a drug of some kind?
A. No.
Q. Okay.
A. No. I don't know that that's what it says.
Q. Okay. He certainly -- at least that portion

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of what I've read, and obviously, I've not read the whole thing -- he's saying that the bottom line and the key and the essence, and the reality of smoking is getting at that nicotine. That's what smoking is all about, nicotine?
A. I think that that's a reasonable conclusion. I mean, I don't know if it's reasonable or slightly overstated or what it is, but I'm not going to quibble with you that he certainly focused on nicotine here.
Q. The next document, dated September 8, 1971, from Dunn, Johnston, Ryan and Shari to Icorn.
Now, Mr. Morgan, the subject of this

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interoffice correspondence is: Plans for 1972. The first sentence in the second paragraph on the first page, says: Our plans now are to concentrate upon that nicotine delivery range between 0.3 and 1.2 milligrams with a systematic manipulation of the nicotine/tar ratio at incremental nicotine levels within this range.

Have I read that correctly?

A. Yes, you have.

Q. Okay. Now, Dr. Icorn was who back in '71?

A. I don't remember, but I think it's fair to guess he was an executive in R&D.

Q. Do you know any of the other people?

A. Dunn, Johnston, Ryan, I know who they are.

15808

Shari, I know.

Q. Okay. That's all I have on plaintiffs' Exhibit 12.

Plaintiffs' Exhibit 13, a document dated May 7, 1968, apparently from Dird, W. Dird to G. Berman. The title of which is: TPH Intake by Smokers.

Who is Dird and who is Berman, if you know

A. Berman was probably a gentleman named George Berman. I don't know what role he would have played at that time. And I read this as Dunn, not Dird, but I may be wrong.

Q. You're probably right.

What does TPH mean?

A. I don't know.

Q. Now, the second sentence says: Since there is evidence that the smoker adapts his puff, it is reasonable to anticipate that he adapts to maintain a fairly constant daily dosage.

And then we go down toward the bottom, the last paragraph: We are currently negotiating with a Ph.D. psychologist. If he joins us in September, as hoped, I plan to have him devote two-thirds of his time to basic psychological research. We would want to institute a study of individual differences in inhalation quite early in his program.

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Do you know whether this research was carried out?

A. No, I do not.

Q. Next, Plaintiffs' Exhibit, which is what, 19?

Plaintiffs' Exhibit 19 is a letter from H. Wakeman, vice-president corporate, research and development, to Senator Earl Clemmons of the Tobacco Institute. I do not notice a date on this.

Is Wakeman someone you knew?

A. Yes, I knew him.

Q. Is a vice-president corporate research and development, what is that, the number two person in research and development?

A. No. I think at that time it would have been the number one person.

Q. The number one person, okay.

And this letter went to J.F. Coleman, III, and what was his position?

A. Well, did we establish the date of the document?

Q. No. It's in the '70s.

A. Well, I think all through the '70s, Mr. Coleman was chairman of the board of Philip Morris.

Q. Millheiser?

A. Not sure. It depends on the time, but

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probably, if it were early in the '70s, it would have been president of Philip Morris USA.

Q. And Goldsmith was?

A. He would have been head of operations at that time, having manufacturing and R&D under him.

I think maybe I could help this way. Independent of the actual titles of those three gentlemen, that would have been all the way through whatever period the hierarchy, with Coleman at the top, Millheiser second, and Coleman third. Then we have to slot in by year where they were.

Q. October 25, 1978, from Seligman to the CTR file, about a CTR meeting which occurred October 18, 19, 20, 1978.

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In the first paragraph this sentence appears:
Do you want to hand it to the witness?
Now, the sentence appears at the most recent
meeting: Ed Jacobs was not present, but Add Yeaman
said that certain grants would be reviewed by counsel
after receiving SAB approval.
To your knowledge, why would there be a need
for counsel to review any grants?
A. I don't know.
Q. So this is Exhibit 21, a memo from J.L.
Charles to Dr. Seligman, March 18, 1980, two pages.

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Subject: Nicotine Receptor Program, University of
Rochester. And this would be Plaintiffs' Exhibit 22.
Follow along with me, Mr. Morgan. The first
paragraph: Nicotine is a powerful pharmacological
agent with multiple sites of action and may be the most
important component of cigarette smoke. Nicotine and
an understanding of its properties are important to the
continued well-being of our cigarette business, since
this alkaloid has been cited often as the reason for
smoking, and theories have been advanced for nicotine
titration by the smoker.
Do you know what nicotine titration means?
A. No.
Q. Now, Mr. Charles is saying in the first
sentence, in the last paragraph, on Page 1: The above
is an excerpt from an introduction to the nicotine
program, which I wrote on December 1st, 1978. My views
have not significantly changed since that time.
Now, on Page 2, by the way, who is Charles,
J.L. Charles?
A. He was -- Jim Charles was a principal
scientist at Philip Morris, R&D.
Q. With a Ph.D. in something or other?
A. I don't know that.
Q. Second page, second paragraph: In summary,

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the nicotine receptor program at the University of Rochester is an integral part of our overall nicotine program. The combination of basic research on the pharmacology of the nicotine receptor, combined with the capability to screen nicotine analogs, for CNS activity complements our internal synthetic and behavioral efforts in the nicotine program.

What was the nicotine program, do you know?

A. No, I don't.

Q. Dr. T.S. Osdene, who is that?

A. He would also be a scientist, principal scientist at R&D.

Q. Now, I had asked you earlier today about a Frank Statement to Cigarette Smokers. And I believe you told me you had never read it?

A. No. I've not read it.

Q. Now, that is not necessarily precisely the way it appeared in the newspaper, but word for word, a word here or there may be misspelled, but that's precisely what appeared in every major newspaper in America in January 1954?

A. '54.

Q. '54. Take a moment to read it.

Okay. Is there anything in that with which you disagree in terms of today? Is there any statement

made in there that you would take issue with today?

A. I think that we're talking 43 years ago.

Q. Correct.

A. I don't know whether I take issue. I think some of the statements don't hold up as well today as they may have. I don't know, because I wasn't involved in '54, but I think some of the statements are not real solid today.

Q. Okay. Let me ask you specifically about a couple of them. The statement is made that there is no proof that cigarette smoking is one of the causes, referring to lung cancer in the first column.

A. No. 3?

Q. That there is no proof that cigarette smoking is one of the causes, and it refers to lung cancer.

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That would still be -- as I've understood your testimony today, that's what you say today.
I mean, I understood you to say there is evidence out there about statistical associations and there is some epidemiological evidence, but today, as I've understood your testimony, you are still comfortable with the statement that there is no scientific proof that cigarette smoking is one of the causes of lung cancer?
A. Well, rather than you characterize what I

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think, I'd rather just restate it.
Q. Fine.
A. I believe there is. You say, hard word, epidemiological statistical associations between smoking cigarettes and lung cancer, I accept that. And I'm not sure, certainly I can't debate that, but I'm willing to say that's a nondebatable factual issue.
What I said was that for over 40 years, that the process by which you go from a lit cigarette to lung cancer in a human being has not been documented, validated, determined, and in many, mostly -- I should be careful saying this -- I'm not sure it's even been speculated because it's so far from being understood. And, therefore, to say the word "cause, there is no proof that cigarette smoking is one of the causes," is an accurate statement if you're talking about the process.
To say that there is no proof that cigarette smoking is one of the causes, if you were talking only about the epidemiological statistical part of it, is a little shaky statement, because I think most people agree there are statistical associations.
Q. But insofar as the classical, precise definition of "cause" is concerned, we are in 1997 where we were in 1954?

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A. Well, oh, boy. I wasn't there in '54,

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but my guess is --

Q. No, I mean, in terms of the language of The Frank Statement that there is no scientific proof that cigarette smoking causes lung cancer.

A. I think since '54 there has been a rather large advance in understanding statistics of the issue, so I am saying that there is no proof that cigarette smoking is one of the causes, basing that opinion on the fact that the process by which it happens has not been articulated, proven, or validated, or even speculated.

Q. And the only way we are ever going to be able to get an answer to that question is by doing additional research and funding additional research?

A. For me and my use of the word "cause," that would be true, yes.

Q. We can be sitting here or our children can be sitting here 43 years from now and still saying we need more research?

A. Well --

Q. Because you have no idea when there will be an answer?

A. Is that wrong, if it's not been shown how it happened?

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Q. From your standpoint, you know, if our kids are here in 43 years still debating these same issues, nothing terrible about that?

A. Is that a question?

Q. Yes.

A. I don't believe there is a debate. You and I are debating it because we are arguing over the word "cause" and the definition of cause. I don't believe there is a debate in our society, and if you believe, as I do, in the ultimate supremacy of adult informed free choice, then I would have to really debate in my mind whether it's better to act on what is assumed

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or
whether it's better to act on what's known, if the public belief is closer to what's assumed than what's known.
Q. You don't believe there is a debate on the issue of cause?
A. In the public's mind?
Q. Correct.
A. I believe, as I've said several times today, that I believe that the public assumes that smoking cigarettes causes lung cancer in some people.
Q. So there is a scientific consensus, a medical consensus, and a public consensus in your opinion on the issue of causation. And the only segment of

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society which does not join in that consensus is the tobacco industry?
A. I don't think that's a fair characterization.
Q. Name another segment of society. You've told me the public believes it and they believe it based on the Surgeon Generals and the public health community and doctors. And I'm asking you if you can name one other segment of society that doesn't believe cause has been scientifically established, other than your industry?
A. First of all, I believe you really should talk to Dr. Ellis about that, who is more attuned to what groups are saying what than I am.
I believe there are a majority of people who, without getting into the details of the discussion we've had about the lack of process documentation, that the majority of people do believe that if you smoke cigarettes, you run a very high risk of getting lung cancer.
(The videotape ended.)
THE COURT: Is that it?
MR. HEIM: That's it.
MR. ROSENBLATT: That's it. In terms of scheduling.
(Discussion off the record.)

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THE COURT: All right, folks. Lunch time, I guess. 1:30. Give you time to stretch your legs and all that. 1:30. Same rules apply.

(The jurors exited the courtroom.)

THE COURT: All right. I'll see you at 1:30.

(Court was adjourned at 12:10 p.m.)

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